THE COURT: Yes, he is not sufficiently qualified to give an opinion as to what the City Council would do under the hypothetical you presented.

MR. GOEBEL: Well, let me attempt to rephrase the question.

THE COURT: You may.

BY MR. GOEBEL:

Q. In your -- Do you have a professional opinion as to whether the City of San Diego could purport to deny any industrial development plan on this property based on the assumed facts on the sole basis that the development proposed was inconsistent with the open space designation on the subject property?

A. I --

MR. SUMPTION: Object, it's closer to a pure legal question of interpretation of the effect of the acts done by the City Council.

[94] THE COURT: If I understood the question as phrased, the question was whether he had an opinion that the City Council could purport to deny the application.

MR. SUMPTION: I interpret that as meaning, your Honor, are they legally compelled to do one thing or the other, and I don't know if that's the intent.

THE COURT: As phrased, it's asking the witness whether that is physically possible, and, of course, the answer has to be yes. That's obviously not what he meant. Would you rephrase the question?

MR. GOEBEL: I think I'll approach it a different way.

Q. Mr. Worley, in your professional opinion having advised clients in this area on a number of instances, would it have been on the basis of the assumed facts, reasonably prudent for a property owner to incur the expense of preparing development plans and submitting them for approval to the City of San Diego?

MR. SUMPTION: Object to the question. I think it's just seeking indirectly what the Court has ruled cannot be asked directly. I think it's just one step removed.

MR. GOEBEL: We're not into a different area, talking about the plaintiff being deprived of any practical additional or conomic use of the property, and one element is the fact of whether it wuld have been prudent for the plaintiff, as the property owner, to have incurred the expense necessary to even reach a decision as to whether or not the
[95] property could be developed.

THE COURT: If the question, Mr. Goebel, is designed to explain the reason why the plaitiff did not seek such relief from the City, it would be relevant and admissible. On the other hand, if the thrust of the question is to convince the trier of fact that the City Council would not have granted the relief, it meets the same objection that the Court has earlier sustained.

MR. GOEBEL: Well, I would apply it to both, but I think it's admissible then for the limited purpose that the Court has indicated.

THE COURT: The Court will admit it for that limited purpose.

The substance of the question is whether you, in your expert opinion, would have advised the plaintiff that it would have been meaningless to have prepared and submitted plans to the City under the circumstances.

THE WITNESS: Yes, I would have so advised.

BY MR. GOEBEL:

Q. Mr. Worley, what is the basis for your opinion -- or would be the basis for your advice?

A. Well, the basis would be that, in my opinion, the open space designation would preclude development for several reasons. The first
[96] being the existence of a section of the planning act which, by its terms, preclude development by precluding issuance of a building permit or the approval of a subdivision map if the particular development is not consistent with the open face [*sic*] element.

Secondly, there's a provision of the Subdivision Map Act, and I would also presume that a development of this magnitude would likely result in the requirement for the filing and recordation of a subdivision map bringing into play that requirement of the Subdivision Map Act. I believe that's Section 66474 of the Government Code which mandates that a City Council deny approval of a tentative subdivision map if it is not consistent with applicable general and community plans inasmuch

as the open space element is a portion of the City general plan, it would -- the subdivision map would be inconsistent with the open space element since the second legal ground and the third would be simply that the designation of the property as open space, based upon my experience, is indicative of the Council will not to permit development on that property, and based on my experience, they would do everything possible including full use of the legal and Code sections that they have available to preclude development and to deny a development plan, so I believe that all things considered, it would not be prudent or not be a prudent expenditure of time and money to process a development plan under the circumstances.

MR. GOEBEL: I have no further questions.

THE COURT: You may cross-examine.

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CROSS-EXAMINATION

BY MR. SUMPTION:

[97] Q. Isn't it a fact that you have pending in this Superior Court a lawsuit entitled Hall, et al., vs. The City of San Diego that raises substantially the identical issues that you've just testified to?

A. Yes, that's correct.

Q. Mr. Worley, are you aware of an instance, any instance wherein the City Council has approved development of property notwithstanding an open space designation on that property?

A. I'm aware of only one instance in which they have done so.

Q. Is that Jutland Canyon?

A. Yes.

Q. And I believe you testified that you're aware of one instance where you reached the opposite interpretation; is that not correct, that is, a rejection by the City Council based --

A. There was one instance within the last year in which I represented a client in which the subdivision map was denied basically because the property was designated as open space on the community plan.

Q. From those instances, you have concluded that the City Council in this particular context would interpret that no use of the property in
[98] accordance with the underlying zoning is consistent with open space?

A. Could you ask the question again?

Q. Well, I believe you testified that your interpretation of the Subdivision Map Act and the State Planning Act requires consistency with open space or, in the converse, it would compel a rejection of the proposed construction or the subdivision map?

A. If it were inconsistent with the open space plan, that's my interpretation.

Q. Therefore, do I understand your testimony in the context of this particular property wherein you are asked, "Would you have advised this plaintiff not to pursue a project to be granted or denied by the City for building on the property?" To mean that you feel the City Council would necessarily interpret any such development as being inconsistent with open space?

A. It would most likely do so, especially if it didn't want the property developed.

MR. SUMPTION: I have no further questions, your Honor.

REDIRECT EXAMINATION

BY MR. GOEBEL:

Q. Mr. Worley, you referred to the Jutland Canyon Project. Were there any factors present there which you have considered to be persuasive in causing the Council to approve the project even though it was designated for open space?

[99] A. I believe so. I was not personally involved in that project, but I do believe that the particular community plan designation has an express alternative land use and that either park or open space or this alternative residential land use by the terms of the community plan itself would be deemed to be consistent with the plan, and I believe that the Council used that alternative in justifying it, but I also am aware that that particular project is still in litigation and has not been finally approved -- has been challenged in the court.

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Excerpts from testimony of **A. Lee Griner**:
(called as witness by plaintiff)

[108] THE WITNESS: My name is A. Lee Griner, G-r-i-n-e-r.

DIRECT EXAMINATION

BY MR. GOEBEL:

Q. What is your current residence address, please?

A. 86712 Aries Street in La Mesa.

Q. Are you presently employed?

A. I'm part-time self-employed. I'm -- Excuse me.

Q. What trade or occupation?

A. Consultant and foreman, ranch development and natural resource conservation.

[109] Q. Briefly, what has been your employment history?

A. I worked about 28 years for the Soil Conservation Service of the U.S. Department of Agriculture since 1956 in San Diego County.

Q. Starting in 1957, could you briefly describe the nature of your assignments with the Soil Conservation Service?

A. The work was primarily as a consultant with private land owners recommending crops that could be grown on certain types of soil, the type of treatment that would be necessary to be successful with each undertaking, the type of irrigation to carry out irrigation techniques necessary dependent on the quality of water, things of this nature.

Q. Did this take you to all parts of San Diego County?

A. Yes.

Q. And into all types of agriculture regularly conducted in San Diego County?

A. Yes.

Q. And I take it you were employed by the Government, and the Government paid for your advising private property owners; is that right?

A. Yes. The Soil Conservation Service worked through Resource Conservation Districts which are legal subdivisions of the county in which they're organized.

Q. Okay. Now, since your retirement from work with the Soil Conservation Service, what have you been doing?

[110] A. I have been doing consulting work with some ranches in San Diego County, with a couple in Baja California. I've been doing some work for the Department of Agriculture in Mexico in Baja California. I have done some consulting work with some engineering firms in the County and also with some departments of County Government.

A. And your work with these private clients, is it similar to the type of service that you provided when you were employed with the Soil Conservation Service?

A. Yes, sir.

Q. Okay. Can you give the Court a brief synopsis of your formal educational background?

A. I got a degree in -- Bachelor's Degree in Range Management and Wildlife Management from Utah State University, School of Forestry in 1937.

Q. Since that time, have you participated in any continuing education programs in the area of soil agriculture and agriculture management?

A. Yes. The Soil Conservation Service had a very good ongoing training program, usually one or two training sessions each year from one to two weeks in duration. Since about 1955, I directed some of these training sessions.

Q. Are you the -- a member of any professional societies in your area of specialty?

A. I belong to the Soil Conservation Society, the Society for Range Management, and the California Section of the American Society of Agronomy.

[111] Q. Now, the property which we're concerned with in this lawsuit is property located west of Interstate 5. I'm indicating on Plaintiff's Exhibit 1 and south of Carmel Valley Road in the area generally known as Sorrento Valley. Are you familiar with that property?

A. Yes. I was out on it.

Q. Now, have you conducted a study to determine the feasibility of utilizing that subject property for agricultural purposes?

A. Yes, I have.

Q. How did you proceed with that investigation?

A. I got some of the literature that was available, primarily an original soil survey that was made by soil scientists in the old Coastal Soil Conservation District. This was done in about 1950 through 1952. I reviewed their recommendations and their classifications of the soil in that area. I reviewed the final soils mapping that was one in cooperation with the County of San Diego for publication purposes, and that was finished in about 1970. I reviewed the literature on the types of plants that would grow under certain conditions of salinity.

Q. Aside from reviewing the written literature, what other steps did you take in your investigation?

A. I had the Environmental Engineering Laboratory go out with us to the site and take soil tests in four different places.

[112] Q. And did you supervise the taking and selection of these locations?

A. I supervised selection of the locations and depth at which the samples were taken.

Q. And was this sampling technique consistent with -- the technique consistent with the techniques used by the Soil Conservation Service?

A. Yes. Both outfits used what's called a technique 60 of the United States Salinity Laboratory.

Q. Okay. After you had visited the site and taken the -- supervised the taking of the samples, what did you do next?

A. I reviewed the samples and reevaluated them on the basis of what possible plants could go there.

Q. Now, I understand you were at the site. Can you describe for the Court in terms of your specialty the physical condition of the site, that is, the present agronomy of the subject property?

A. The site shows no evidence of ever having been used for any agricultural purpose other than probably some grazing or pasturing. I'm sure there's never been a tillage tool on it, because as dry as it is this year when we were out there, there was no part of it that's dry enough that one can plow or disc or harrow or otherwise till. The areas that show bare on the map over there are primarily salt pans, areas in which there is no vegatation [*sic*] growing. Areas of different shades of brown are occupied by a small variety of highly salt tolerant plants.

[113] THE COURT: What?

THE COURT REPORTER: Salt tolerant plants.

THE WITNESS: Then up in the northwest areas where there's a continuing of blue, this is the area that is occupied more or less regularly by tidal waters and areas that show fingers of broad dark-colored lines or tidal channels that have water where the tide comes in.

BY MR. GOEBEL:

Q. Well, have you obtained the results of the -- Strike that.

Can you describe the nature of the vegetation that you found presently on the property?

A. Yes. It's primarily plants like pickle weed and alkali heath, desert salt bush, salt grass, one or two other highly salt tolerant plants. I didn't make a full catalog because in reviewing the literature, there is some 60-odd plants that have been found and identified in that general vicinity.

Q. Based on your experience of the vegetation that you found on the subject property, does it have any economic utility for grazing purposes?

A. Very little. I would estimate that in the normal year that it would take from 40 to 60 acres to provide enough forage for one cow for one month.

[114] Q. Now, have you obtained the results of the soil test that you supervised?

A. Yes, sir.

Q. What, in general, was the indication of those tests as it relates to viability of the property for agricultural purposes?

A. Extremely high salinity. We had tests made at four sites. One test was simply a surface inch of soil on which white residues existed. This showed an electrical conductivity of 70,000 millimoles which is extremely high when one considers that it's generally recommended that soils higher than 16 millimoles and soil conductivity are unsuitable for any type of economic agriculture without extensive and somewhat artificial land reclamation.

The best soil was -- or the best sample was at a site, I might say, over in -- toward the southwest corner on the -- I'm sorry -- on the southeast corner on the east side of the dike that was put in there when the sewer line was put in. This is an area that I interpreted to be relatively, if not completely, free of tidal action especially since the dike has been put in. The results showed 29 millimoles and was the best soil sample or the best test from that sample, and this at a depth of 12 inches. At six inches, the results were a little bit higher, I think around 14, and at 18 inches depth it was approximately 32.

[115] Q. When you refer to the dike, you're referring to the area of the soil line that shows as a light color on Plantiff's Exhibit 1?

A. Yes, right.

Q. And I take it that that is raised in elevation over the surrounding property?

A. Yes. It's an artificial dike that I presume had to be put in to carry the traffic when the sewer line was put in because you can see extensive sampling of gravel that shows out on the toe of the slope.

Q. The last sample you described was east of that dike?

A. Yes.

Q. Was that near the south or northeast part of the property?

A. It was closer to the north.

Q. Okay. Now, based upon your investigation and upon your years of experience in the field, in your professional opinion, could the subject property be utilized for any economic agricultural purpose?

A. Not for any economic agricultural purpose.

Q. And are there any, in your judgment, any economic means of rehabilitating the property so that it could be utilized for agricultural purposes?

A. Not any means that would -- whereby one could regain their investment let alone make a profit.

MR. GOEBEL: No further questions.

Excerpts from testimony of **William Rick**:
(called as witness by the plaintiff)

[121] Q. And your occupation?

A. Consulting civil engineer and planner.

[123] Q. Were you retained to conduct an investigation of the feasibility of development on the subject property?

A. Yes.

Q. How did you proceed with that investigation?

A. The first step, of course, in any job of this kind is to visit the property and to assemble as much information of record as one possibly can. I'm sure your record has shown the descriptions of the property,
[124] but the areas of investigation, of course, deal with the service utilities and the -- the services available and needed by the project and the physical characteristics of the property itself and the area in which it is situated.

Now, you can further divide the investigation as to -- and utilities, of course, is the first question, the availability of water service, and we found that the property was well served by existing water mains and by existing service. Of course, we're dealing in the charge upon us to investigate the property as it was situated in early 1972, and my answers will deal in that context.

The next question would, of course, be sewage disposal potential, and we found that the property was well served by sewer service by the City of San Diego. The property being owned by the Gas & Electric Company, we were satisfied that power and gas facilities were available.

We asked the owner to employ soil engineering consultants who made an investigation and reported to us that under certain conditions of handling the property, it was suitable for the construction of an industrial development similar to that which had occurred in the southeast. We investigated the flood control situation, the drainage, and found that under the criteria of the City of 1973, that the property could be developed. Having made that investigation, we realized -- and together with the soil investigation, knew that the project area would

[125] have to be raised above its natural condition, and we know that the same owner owns property north of Carmel Valley Road, and made the assumption, which we felt valid, and did determine that sufficient soil was available from the northerly property to be moved across and to create the working areas south of Carmel Valley Road.

So we satisfied ourselves generally that the physical parameters, the physical conditions, could all -- and demands on development could all be met. So then the investigation had to determine as to what public policy would have permitted or seemingly permitted in 1972 as to a land use, and a look at the general plan and progress guide and general plan for the City of San Diego makes -- reveals it clearly that it was the intent of the City of San Diego that the property in the main should be developed for industrial purposes. The progress guide indicates an extension of Sorrento Valley Road basically in a northwesterly direction, generally parallel over the sewer fill that's been made reference to earlier.

Q. When you refer to the progress guide and general plan, you're referring in part to Plaintiff's Exhibit 9 in evidence; is that right?

A. That's correct.

Q. And that shows a designation for the subject property?

A. Yes. That designation is colored blue and under the category of industrial in the legend.

[126] Q. Did you investigate any other land use control status with the --

A. Of course, you'd like to know how firm, if possible, the commitment is, and so if you go back further to, say, to the County plan, while the County authority had no jurisdiction, but the County in 1967 indicated the same use for the property, so that this gives you a feeling of comfort in selecting or determining that the general plan designation was fairly well founded.

We considered other alternates. We considered them just to test them and see if they were more logical either in response to the physical situation or perhaps into market or public need, and it would be my -- Well, I might review those.

Q. Yes. Based on the information that you gathered, this factual background, then did you consider various alternatives for feasible development of the situation?

A. Yes.

Q. And what alternatives did you consider?

A. Going from the least to the highest, of course, doing nothing was not our charge, that is, so that the least productive consideration in terms of urbanization would be agriculture. Well, we did not have the testimony of the previous witness. We've had enough experience to -- I worked the coastal areas of San Diego County -- that we considered that the agricultural use of the property was probably inappropriate. We based this upon the observation of the plant materials and other
[127] experiences that we've had in the coastal areas, so we rejected that. It, of course, is not designated as agricultural on the general plan.

So then we considered the probability of residential use. While the general facilities are available, we did realize that in 1972 there was -- had been resistance to further residential construction in this part of the community, and that weighed in our thinking. In addition, we had a tendency to try to avoid placing residential construction in areas that are subject to inundation or in which you have to design so that structures themselves are above safe flood levels, but certain portions of the property are below. You add that to the fact that the property is bordered by a railroad, by industrial uses to the southeast and by a highway. It doesn't enjoy the advantages of view that say the mesa property might, and culminated in the fact that it's not in accordance with the general plan, then you reject the residential use.

Well, I think it's fair to examine something in between the industrial and residential classification generally known as recreation, commercial; that is, a multitude of possible uses. One would be a golf course, a recreation vehicle park, similar uses. Well, we dealt with a number of golf courses in the projects in which we've been the engineer, and it was apparent to us that in light of our experience that a golf course -- an effort to make a golf course on this property would be
[128] tenuous -- the results would be tenuous principally because a golf course must be well drained on the surface and in the subsurface. We would have to bring in about as much dirt to create a golf course in the area as we would have to build an industrial project, and we knew that other clients, principally the golf course at La Costa, which had been built in a low area with poor drainage suffered under considerable added expense and difficulty for a number of years, so the forecast and the prognosis for the physical operation of the gold [*sic*] course idea was not good.

Well, in addition -- In development, golf courses normally are a supplemental land use in that you try to create a golf course in the midst of a larger development in which the benefits of the golf course can be realized in the enhancement of land values whether they be commercial or residential in the properties that the developer owns around the golf course. Examples are at La Costa, Rancho Santa Fe, Rancho Bernardo, and the majority of privately developed golf courses. A free-standing golf course, that is, one in which it occupies the entire property owned by the owner of the golf course, is found more normally in public golf courses where the land, in effect, is not expected to show a return. Once again, however, if you refer back to the general plan which did not designate this property for commercial recreation, we considered the
[129] possibilities within the hundred and 200 acres, that one might place a motel; but if you examine the freeway intersection conditions between Mission Bay and Oceanside -- and we had worked on a number of those for the property owners at interchanges, we found, to my recollection, there was only one motel built just east or near and east of the Veterans Hospital in La Jolla, and we believe the reason that motel development has not been attractive is the proximity Mission Bay. Mission Bay is such a greater attraction than lower Penasquitos that there's little incentive for the considerable investment that this property does not have ready access to the beach. While it's within sight, it's not within walking distance as you find the motels in Mission Bay, so this tended to rule out that type of development. It's conceivable, and I certainly agree that a small recreation vehicle park might work. Those parks don't run to large sizes. Ten acres is a fairly good-sized one, and it's conceivable that that would be an economic use within the property. I don't really think that I'm qualified to discuss the economics of recreational vehicle parks; however, it's possible that 10 of the hundred and so acres of this property might be suitable. That generally is the gambit of uses.

Q. Okay. Then with the exception of the industrial in your analysis, you've ruled out the other alternative uses as being feasible?

A. From our experience in land planning and general engineering,
[130] You could do them physically, but in comparison and past projects, it seemed inappropriate and counter to the general plan designation.

Q. Then did you focus on the industrial possibility to determine whether it appeared to be feasible?

A. Yes. We prepared a plan for development and prepared a cost estimate for that development.

Q. Then based upon your investigation, what, in your opinion, was the highest and best use of the property in its condition just prior to June 1973?

A. We felt the highest and best uses were industrial on about 150 acres of it, and the balance should be devoted to an enlargement of the state park preserve.

Q. Then how did you -- You mentioned that you conducted a study on the industrial development in terms of feasibility from a practical and economic standpoint. How did you proceed with that detailed feasibility study?

A. Of course, the road system -- I've already talked about sewer and water, and those systems exist generlly down the spine of the property in reference to the exhibit.

Q. Plaintiff's 1?

A. Plaintiff's 1, it can be seen as a light line running generally from northwest to southeast, and that's the sewer fill that's been referred to previously. If you'll compare that photograph with the general plan, you'll note on the general plan a black line which is the northwesterly

[135] developing would be the fact that it would be the situation that the development itself would have a need for some maintenance in that the silts generated upstream primarily on the east side of the highway, I-5, would tend to drop out, that is, would be deposited within the development. I don't view that as a major difficulty. It's a, in fact, simpler management problem is you have the property divided as large commercial properties, commercial or industrial in which there's a business responsibility than if it's divided in small pieces for individual residential responsibility or where this deposit is going to be made onto a golf course, and so we felt in light of our calculations and in light of work that we had done previously in Mission Valley that it was -- it would be a prudent and certainly normal development decision to construct an industrial park in a floodplain of this nature. We were untroubled by any adverse considerations.

Q. So that it appears that you've covered the physical aspects, the circulation, the utilities and the flood aspects. Did you give consideration to land use control aspects that might be involved with industrial development?

A. Yes. In dealing with -- In making decisions as to what's an appropriate land use, you must consider the public interest, and it was our judgment that the available industrial zones -- that the MIP zone is the appropriate one. That requires -- Well, it's an industrial park zone and
[136] that one should look forward to complying with the provisions of that zone, that is, it's one which controls the environmental considerations, noise, smoke, and view requires 25 percent of the individual's sight [*sic*] to be landscaped, and these are important considerations. We appreciated the fact that it would be well to enhance the view from the freeway to the west, so the plan that we considered asumes a removal of cut bank, relatively small cut bank on the west side of I-5 which obstructs the view of the freeway to the ocean. We felt in 1972 we had just secured a permit for similar work near Interstate 5. Further, the design -- we felt that it would be one that was reasonable to expect approval on, did not get out into the tidal areas, in fact, held back from that portion of the property.

Q. I take it then these were in the nature of concessions when you start to make the property attractive for obtaining the --

A. I think the principal factor is that the importance of employment opportunity in the San Diego area, as opposed to other potential uses for the land and its extension, is a logical extension to a rather well-done industrial park to the southeast.

Q. Now, Mr. Slayter yesterday told us about the influence of tidal action. Exhibit -- Plaintiff's 16 in evidence -- he testified that tidal action is limited to the area indicated there in greenish-blue. Then he also
[137] indicated that he had placed another line upon Plaintiff's 16 which is lime green and indicated "limit of development." Does that correspond to the area that you considered for trial development in your feasibility study?

A. Yes.

Q. So that you considered no industrial use of the subject property west of the lime green limiting line?

A. Correct.

Q. Then what would have been proposed for the use of the property to the west?

A. That it be left in its natural state and offered to the State of California to augment the Torrey Pines Park preserve.

Q. Mr. Rick, on Plaintiff's 1, I've put down the next overlay which we'll ask to be identifed as Plaintiff's 1-E. Would you approach the exhibit?

(Plaintiff's Exhibit No. 1-E was marked for identification.)

Does Plaintiff's 1-E illustrate the concept that you were approaching in determining the feasibility of the property for industrial development?

A. Yes.

Q. And would you then indicate for the Court on Plaintiff's 1-E the area contemplated for industrial development and the area contemplated to be reserved in the original state?

[138] A. The limits contemplated for industrial development are the westerly line of Freeway I-5 and its interchange at Carmel Valley Road; at the southeast, generally the line of the northwesterly extent of the industrial development shown on the exhibit as buildings in the photograph; then the southwesterly limit would be the line of the railroad right-of-way up to the line shown on the previous exhibit as a lime green line; then the westerly -- northwesterly limit is the continuation extent of the lime green line until it meets Carmel Valley, so --

Q. So that the boundary that we see between the green shading and the brown shading on Plaintiff's 1-E is substantially similar to the lime green line on Plaintiff's 9?

A. Yes.

Q. And then Plaintiff's 1-E also depicts the extension of Sorrento Valley Road through the property as you previously testified. Would you resume the stand?

THE COURT: Mr. Goebel, this is a convenient time for our morning recess. We'll be in recess for approximately 10 minutes.

(Recess.)

BY MR. GOEBEL:

Q. Mr. Rick, before the recess, we were talking about your feasibility study for a possible industrial development for this property. Did
[139] you perform, in general terms, cost estimates to determine the feasibility of a plan of this nature?

A. Yes. We tried to put those cost estimates back to mid-1973.

Q. What development cost per acre of usable land did you arrive at?

A. $24,000.

Q. In your opinion, is a development cost one which developers were willing and able to bear as of June 1973?

A. Yes.

Q. Now, that development cost estimate includes the cost of filling the land and providing the utilities and arriving at a manufactured lot?

A. Manufactured lot cost had a certain allowance for enhancing the -- for some public interest investment in the 77 acres to the west or at the channel entrance. It did not include the site development landscaping or the buildings themselves.

Q. But when you were indicating what the developers were able to bear --

A. So that I had a comparable figure or a figure comparable with other projects and other figures that we had experienced.

Q. In arriving at the net usable acre, is it considered that the owner of the subject property would have to give up any further use of the
[140] approximately 77 acres that you had indicated would be desirable to give to the state or otherwise preserve?

A. Correct.

Q. Then in your opinion, a development along the general lines as depicted on Plaintiff's Exhibit 1-E was economically feasible in June of 1973 and a reasonable period thereafter?

A. Yes.

Q. In your opinion, was there a reasonable probability of obtaining all necessary governmental approvals for such a development during that period of time?

A. I feel so.

. . . .

BY MR. GOEBEL:

[143] Q. Well, Mr. Rick, you've established previously in your testimony, as I understood it, that aside from industrial, in your judgment, based upon the physical characteristics of the property and the existing land use designations even in the before condition, no type -- no use other than industrial were feasible; is that right?

A. Correct. To use -- It's my opinion that to make an economic use of the property shown in brown on, I guess it's 1-E, which is the subject of the discussion, that the developer is going to have to alter the present land form significantly. It's -- That's the basis from which you start, and when you alter the land form significantly, you're tampering with the property in its natural state.

Q. Well, you would then agree that in the after condition as well as in the before condition, all forms of development other than industrial are ruled out?

A. Yes. They're ruled out in the before condition which I presume is the condition in which the open space designation does not apply -- rule out for a variety of reasons.

MR. SUMPTION: Object as far as the open space designation is concerned, the rules.

MR. GOEBE: [*sic*] He was just attempting to describe the before condition.

BY MR. GOEBEL:

[144] Q. Don't -- In your testimony, avoid discussion of the open space condition. Assume that the before condition is the condition that existed prior to June of 1973.

A. All right. In that condition, the assumption is that one may alter the property to accommodate the development under certain restraints which have been part of my previous testimony. Under those conditions, it's my conclusion that the proper use is for industrial purposes.

Q. And was it also your conclusion that any other form of development other than industrial was not feasible?

A. Inappropriate, not feasible.

Q. Now, was there anything to change your conclusion that all forms of development other than industrial were not feasible in the after condition; that is, after the property had been designated for open space?

A. No.

Q. So in the after condition, without regard to designation as open space, all forms of development other than industrial were not feasible?

A. Correct.

Q. Okay. Now, based upon your knowledge and experience in this field and upon the advice of counsel that you previously referred to, in your opinion, is industrial development of any nature feasible in the after condition, after condition being after the property had been designated

. . . .

CROSS-EXAMINATION

BY MR. SUMPTION:

[145] Q. Mr. Rick, could you tell me when you did the feasibility studies? Were they done at one time or over a period of time?

A. They were done over a period of time between, say, June of 1975 through December of 1975.

Q. Had you had occasion to do any studies with relation to the subject property prior to that date?

A. Not to the extent which we did in this instance.

Q. As I understand your testimony then, your studies were done in relation to two time periods, one in what we've been referring to as the before condition and one in the after?

[146] A. Correct.

Q. Did you take into consideration the underlying zoning of the property in both the before and the after condition?

A. Yes.

Q. What was the zoning in the before condition?

A. It consisted of two zones, one an agricultural designation and one an industrial designation comprising the total property.

Q. Each of those two zones would have been applied on some portion of the property?

A. It just happened that they were.

Q. Could you describe generally by direction or location.

A. Generally speaking, the southwest, to my recollection, the southwesterly portion of the property was designated industrial; and the northeasterly was agricultural.

Q. In your feasibility study as far as uses other than industrial, what portions of the property were you concerned with?

A. We generally -- I limited myself to the area designated as brown for the reasons that I previously stated of the general public interest, and I felt that the area shown on the exhibit in green precluded consideration of development in the area with a general need for some quid pro quo as far as securing necessary permits is concerned.

[147] Q. In other words, you're referring to Exhibit 1-E, are you not?

A. Yes, sir.

Q. In other words, for both of your feasibility studies, one for industrial use and one for any other potential use that you testified you considered, you based it on the configuration shown on Plaintiff's 1-E wherein a portion of the property designated in green to the northwest was more or less ruled out of consideration as far as actual development?

A. Yes. The securing of approvals from public agencies often depends on the willingness to provide some public betterment, in this case, enlargement of the Torrey Pines Park, and that opinion of mine comes from the fact that the area's affected, in part, by tidal action. It's a resource area of small value.

Q. Is that portion not referred to as the lagoon on --

A. Oh, there are various definitions of lagoon. I prefer to keep to the one that calls a lagoon one that has tidal water effect.

Q. Are you familiar with the terminology "estuary"?

A. I've used the term. Once again, I think you're -- my understanding of the term "estuary" is that it's a lagoon connected to the ocean, generally a salt water situation; whereas a lagoon is a lake, is a form of lagoon, and the terminology is a little looser, but once again, I don't

. . . .

land use today or in 1973 or whenever?

[152] A. I think it's called a progress guide; is it not?

Q. In connection with your feasibility studies, did you conclude or find that various portions of the property other than what's shown as the green area in Plaintiff's 1-E were also subject to inundation by water or flooding?

A. Yes; except for the higher grounds east of the present Sorrento Valley Road. That property in brown is subject to inundation for the reasons I pointed out, that is, you have a sand plug at the ocean outlet, and so when it rains --

Q. In fact, I believe you testified that that might create some sort of problem in connection with the feasibility of residential use?

A. Yes, I did.

Q. I believe, Mr. Rick, you mentioned a figure of 150 acres for industrial use, is that --

A. 135 is the figure. I stand corrected. I was going from memory and not with the exhibit in front of me.

Q. But what you were referring to is --

A. The area of brown, yes, sir.

Q. Thank you. Mr. Rick, were you, in connection with your feasibility study -- Have you testified before the City Planning Commission or City Council in connection with this proposition and your findings?

A. No, sir.

[153] Q. Have you conveyed the results of your studies to members of the Planning Department and staff?

A. No, sir.

Q. To your knowledge, has the plaintiff ever applied for permission to develop according to your feasibility studies?

A. Not to my knowledge.

MR. SUMPTION: I have no further questions, your Honor.

REDIRECT EXAMINATION

BY MR. GOEBEL:

Q. Mr. Rick, you referred to public betterments in respect to the area in green on Plaintiff's E-1, and I think you referred to some remedial work at the area of the plug and also the creation of a Least Tern nesting area. Did you include those public betterments within your cost estimates?

A. I included a sum of money representing what we felt was a reasonable contribution towards those betterments.

Q. Okay. Now, Mr. Sumption just asked you if the plaintiff has applied for development for the property, and based on the plan developed in your feasibility study. Now, you, in the course of dealing with clients, frequently represent the client before the public agencies, and you're without the benefit of counsel; isn't that right?

A. That's correct.

Q. And you're frequently in the position of advising

[156] Q. Mr. Rick, on the basis of your professional experience, and assuming that the property was in the condition after June 19, 1973, as it had been designated as open space, would you have advised this property owner to spend the money necessary to go forward with an industrial development plan for the --

MR. SUMPTION: Your Honor, I'll object on the grounds of relevancy.

THE COURT: Overruled.

THE WITNESS: No.

BY MR. GOEBEL:

Q. What's the basis for your opinion?

A. Earlier -- Well, my work and recommendations, of course, must follow in light of some experience with the Code under which I'm working, the Municipal Code, and the Municipal Code, as I recall, is pretty specific in its definition of open space, and I think the words --

MR. SUMPTION: To the extent this witness is going to testify as to his interpretation of the Municipal Code, I'll object on the grounds that he's not qualified.

THE COURT: It's not being offered for his interpretation. It's being offered as a basis for his opinion that he would not have advised the plaintiff to proceed, so it's overruled.

[152] THE WITNESS: Once again, the recollection maybe is faulty, but I think it refers to land essentially in its natural condition or natural state, and as I previously testified, I believe, there is no economic use of the property which I felt could be made, whether the highest or the least, would not involve a significant change in the -- from the natural condition of the property. Hence, I feel that I could not have recommended that the owner or prospective owner expend the moneys necessary to pursue a plan in light of that definition.

MR. GOEBEL: No further questions, your Honor.

MR. SUMPTION: No further questions, your Honor.

EXAMINATION

BY THE COURT:

Q. Mr. Rick, I'm somewhat confused by one of your statements. Is it your opinion that the open space designation precludes, for example, a golf course?

A. No, not generally. Certainly not in other jurisdictions in which we've dealt. The thing that troubles me is the -- is the definition of open space that I find in the Code that requires it to be essentially in its natural condition, because to create a golf course on this property, you have to import a considerable amount of soil needed to raise it up above the obviously unsuitable natural soils.

Q. What distance are you referring to, sir? What would be required, three inches or 35 feet?

[158] A. No. Three to four feet, maybe five feet depending on the mounding, but once -- we considered in the before condition the potential of a golf course and its suitability and rejected in on economic grounds rather than practical grounds.

Q. I understand that. How much would you raise it if you were going to put an industrial park --

A. Raise it a minimum of four -- three to four and higher where the building pads are to go. I believe you might conceivably import a little less material for a golf course than you would an industrial park.

Q. And so your opinion is based on your premise that the Municipal Code precludes the bringing in of some three or four feet of unnatural soil?

A. In answer to the after condition, yes; yes, sir.

Q. You earlier tetified that, generally speaking, golf courses to be economically feasible, other than those erected or maintained by public agencies, are done so to assist the developer in selling or enhancing the property which surrounds the golf course; is that correct?

A. Yes. In effect, you are shifting your land basis to the surrounding property and reducing the land basis to the golf course, so the economic return requirement is less.

Q. There are, of course, a number of exceptions?

A. Oh, Singing Hills was an exception, but Singing Hills is now moving into development of surrounding lands.

Excerpts from testimony of **Joseph Gallagher**:
(called as witness by the plaintiff)

. . . .

[250] Q. Your business or occupation?

A. Real estate appraiser.

. . . .

[254] Q. Specifically, have you gained any experience in the area of utilization of land for golf courses?

A. I have.

. . . .

Q. Were you employed by the plaintiff in this matter to make an appraisal of the subject property?

A. I was.

Q. And you are familiar with the subject property being that property located west of Interstate 5 and south of Carmel Valley Road in the City of San Diego?

A. Yes.

. . . .

[261] Q. Mr. Gallagher, in giving your summary, you might summarize briefly the components of the assemblage and give an overall figure rather than going through each detail of it.

A. The critical area from the appraisal standpoint, in my judgment, represented the portion of the assembly from Carmel Valley Road south and between I-5 and the railroad right-of-way, and that area comprising approximately 255.10 acres was acquired from four entities including the City of San Diego itself. The total cost of the assembly was $1,775,146. The acquisition extended over the period of April to September of 1966.

Q. Okay. Now, you had -- were telling us how you proceeded to conduct your investigation. Have you completed, in general terms, the extent of your investigation?

[262] A. Well, there were many other steps taken, but I think that I outlined the more important of the basic steps between -- in arriving at the opinion that I have.

Q. Would you then define the term "highest and best use"?

A. I understand the term "highest and best use" to mean that it's the highest and best use of the land and that use -- it is that use which prudence dictates will, over a reasonably foreseeable period of time, produce for the typical owner the highest net return or benefits, thus reflecting the highest capital asset value and will generally at the same time preserve the utility of the property. It's also sometimes described as being the most profitable and likely use to which a property can be put.

Q. Okay. After your investigation, as you've detailed to us, did you form an opinion as to the highest and best use of the subject property in which we refer to as the before condition or that condition that existed with respect to the property prior to the actions of the City of San Diego in June of 1973?

A. Yes.

Q. What was that opinion?

A. In my opinion, the highest and best use of the appraised property in the before situation was that the majority of the property had the best use of being developed as a modern industrial park.

[263] Q. What were the bases for reaching that opinion?

A. Among the more important reasons, in my opinion, were the following: First, that the City of San Diego general plan of 1990, adopted December 15th, 1967, indicated industrial use for almost all of the property; second, the January 1972 adopted revised general plan indicated industrial use for subject property; three, most of the land was zoned M-1-A, an industrial designation; four, the San Diego Gas & Electric Company itself assembled the appraised property by purchase for a proposed industrial use; five, part of the assemblage was a parcel purchased from the City of San Diego itself, that was zoned industrially at the time of acquisition; six, adjacent lands extending southerly from

the property from Sorrento Valley was . ied for industrial use; next, the trend of development in Sorrento Valley and southerly of the subject property was and is to industrial usage; in addition, our investigation indicated a strong demand among industrial users for locations in the vicinity of the subject property. Also, interviews with district developers indicated a strong demand for the subject property itself for industrial use had it been available. Next, feasibility studies by Rick Engineering Company indicated that industrial development for the appraised property was economically feasible. Also, the land is ideally situated with respect to access, availability of utilities and site prominence for industrial development. These were the major reasons. There are others of a minor nature, but these were the most important, in my judgment.

[264] Q. Then, now would you describe briefly your interpretation of the major approaches to valuation of real property and indicate which were applicable to this situation.

A. There are three primary approaches or appraisal approaches to value. These include what is called the market data approach; another is the cost approach; and the third basic approach is known as the income approach, and the underlying theory of all three approaches is the theory of substitution.

As an example, the market data approach, the underlying theory is that a prudent investor is not warranted in paying more for a given piece of property, everything else being equal, than he would for an equally desirable piece of property subject to the same influences. This is the approach that involves the research into other sales of comparable properties in the vicinity of the land being appraised.

Under the cost approach, the underlying theory is that one isn't warranted in paying more for an improved piece of property than he could go out and buy the land and construct an equally desirable improvement at today's cost.

I used -- Under the income approach, the same type of theory of substitution applies. In that one one would not be prudent in paying more for an income-producing piece of real estate that he could buy -- go out and buy a substitute piece that would offer the same type of return and the same kind of risk. The approaches that I felt were most applicable to this appraisal problem were first -- the primary one was the market data approach, the value indicated for subject property based upon the sales of other properties having the same highest and best use, the same potential and located within the same area.

[265] I used a modified cost approach as a check on the value indicated by the market approach, and this modified cost approach involved the request of Rick Engineering Company to do a feasibility study about the potential development of the appraised property and the cost to bring it to a manufactured state. From this, a -- by residual process, a residual land value was arrived at as a check on the opinion produced by the market data approach.

As an additional check on the value indicated by the market data approach, I researched, as I've already testified, the assembly cost, the actual acquisition cost by the San Diego Gas & Electric Company in 1966, only seven years before the date of value, and applied the trends indicated by the sales of other properties during the intervening nine-year period to the original cost of the San Diego Gas & Electric Company feeling that there is no better indication of the value of an appraised piece of property than the price that may have been paid for it or the price at which it may have been sold. You can't find a more comparable situation.

[266] Q. Then have you arrived at an opinion as to the fair market value of the subject property for its highest and best use in the before condition, that is, in the condition that existed prior to the actions of the City in June 1973?

A. I have.

Q. What is the opinion?

A. $4,200,000.

Q. And briefly, upon what do you base that opinion then?

A. Well, I probably testified to some of the reasons, but as a brief summary, it was based upon an extensive review of comparable sales in the area, interviews with developers of industrial lands in the area, analysis of the trends and absorption rates of industrial properties in the general area. It was based upon the residual land process by having a -- not relying on just my own judgment, but obtaining the expertise of an entity such as Rick Engineering Company to actually work out the probable cost that would be involved in making the land usable for industrial purposes, the trending of the original --

Q. Just a moment. Let me stop you at the last point. We have in evidence here from Mr. Rick that his feasibility study determined that the development cost per acre to get the land to a mnaufactured [*sic*] state would be approximately $24,000. Is that information that you relied upon?

A. It was.

[267] Q. And is it your opinion that that development cost is a cost which persons in the market were willing and able to bear for that condition as of the date of value that you had reference to?

A. It was.

Q. Okay. Then you were proceeding into the trending.

A. I was merely adding that another reason for the opinion was the results produced by trending the original acquisiton [*sic*] costs forward to the date of value as a check on the opinion that I reached based on the market data approach to value. Those were the primary reasons.

Q. Have you also conducted an investigation in an attempt to determine the highest and best use of the property in the after condition, that is, the condition that existed after the actions of the City in June of 1973?

A. Yes, I did.

Q. How did you proceed with that investigation?

A. It was difficult. First, in trying to ascertain, subject to the open space policy designation, what uses the land could be put to, in connection with trying to reach a conclusion with reference to the after highest and best use, I secured various material published by the City on the subject trying to find a definition for the uses that land subject to an open policy designation could be used.

Included in that research was securing copies of what you have handed me as Exhibits 1 and 2 entitled "A Plan for the Preservation of Natural Parks for San Diego."

[268] Q. Excuse me, Mr. Gallagher. There's a "1" and "2" written on that booket, [*sic*] but I think the evidentiary designation is otherwise. Read the orange tag.

A. Correction. It's Plaintiff's Exhibits 10 and 11, and with reference to these publications, I was struck by some of the printed material within the books that helped, at least, for me to explain the difficulties of the problem I have been confronted by. As an example in the interrogatory portion at Page 1, there's a heading, open space -- attempt at definition. Under that, it reads:

> "Although definitions of 'open space' abound, clearly no one of them has yet attained universal acceptance, nor is this surprising for open space by its very nature resists explicit delineation. One of the more recognizable difficulties surely is that 'open space' means different things to different people for different reasons."

The publication also continues to a pertinent section, in my opinion, where it reads:

> "More recently, state legislature defined 'open space land' as 'any parcel or area of land or water which is essentially unimproved and devoted to an open space use.
>
> "The latter term 'open space use' is defined as 'the use of land for, one, public recreation; two, enjoyment of senic [*sic*] beauty; three, conservation or use of natural resources; or four, production of food or fiber."

[269] Now, those categories, as I read them, only set up one productive potential use for a landowner whose property has been classified as open space, and that's the production of food or fiber which is an agricultural type use, and I know that already in this case has appeared an agronomist who has stated that soild [*sic*] conditions within the subject property are such that an agricultural use would be practically eliminated. This certainly supports the conclusion that I had reached from my own numerous investigations of the property with the high saline content of the land and the fact that flooding conditions exist at times, and in addition, even if the soil conditions were such that if filled, you then could support an agricultural use, the cost of that filling in order to cure the flood problem, in my judgment, would eliminate agricultural uses as being economic.

Also, I received from yourself and Mr. Worley, I believe, who has previously testified, the legal opinion that any subdivision would have to be consistent with an open space designation. Before arriving at a conclusion, I also considered the possibility of golf course usage of the appraised property. I related my own personal experience in both

appraising and being involved with the open space of a golf course, but in addition, interviewed Mr. Ted Vallis, V-a-l-l-i-s, who is the founder and president of Golf Course Inns of America as well as International Golf -- I better get that name correct -- Golf Inns International. This gentleman is operating the corporation -- owns and operates three golf courses here in Southern California, the closest one being Whispering Palms about two miles north of the appraised property as well as golf courses throughout portions of Europe. In connection with that interview, Mr. Vallis accompanied us down to look at the property, and the bottom line of his judgment was that even if filled, he wouldn't take the appraised property as a gift for golf course usage, and he had numerous reasons for it which have been supported by our own findings.

[270] First, we're dealing with a gross usage area of approximately 135 acres that would be available for a good recreation course, and in his judgment, even if the land were adaptable, it would be very tight by the time one set aside areas for tennis courts, the club house, and the other sporting facilities, but more important were two elements that he was -- he forcefully brought to our attention of the 63 courses located in San Diego County, 24 of them would be in direct competition, in his judgment, with any kind of a golf course development on the subject property. Of those 63, at the present time only five are either breaking even or making any money of any kind. These included such courses as Cottonwood, Singing Hills, Stardust, Pala Mesa and Whispering Palms, his own golf course. When queried on why this was the case, why the ones that he mentioned were making money in contrast to the other courses, he quoted several reasons as an example. The cost data as compared with these -- said another way, the courses that were making money were courses built many, many years ago. Singing Hills was a prime example, in his mind. When that course was developed, land cost out there was in a nominal $200, $400 an acre. It cost about $6,000 a hole to produce the course that he estimated the maximum cost when it was built at $250,000. Yet to produce the same kind of course today at Singing Hills would be about two million five. In support of that judgment, he mentioned the fact that nine holes were added at La Costa not too long ago at a cost of $100,000 per hole. A course in Oceanside is not quite fininshed, [*sic*] and it already has cost over $55,000 a hole, and they still have many things to do on it, but these --

[271] Another, of course, most important fact was that even if filled, in his judgment, the saline content of the overlying soil conditions were percolating through and making it almost impossible to support all of the planting and lawn area and things of that sort that would be required for a golf course, and there's a final judgment also -- this is from a golf course standpoint -- it would have to be judged fairly -- it doesn't have much character. It's flat land, and while grading could produce rolling greens and lower and higher elevations, it still would not have the attractive environment and topographical characteristics to make a desirable golf course.

[272] Q. Did you examine any other potential uses consistent with the open space designation?

A. Yes. I considered whether or not there was a potential for some minor uses, oh, such as an RV, vehicular park, and in my judgment, only a small area or small portion of the appraised property would be adaptable to that use even assuming the open space designation would permit it, and I cannot get -- have not been able to get a clear indication that it would, but even then, the grading that would be required, the filling that would be required and the fact that only a tiny segment of land, in my judgment, could be used, ruled that out as a possibility.

Q. Then based upon your investigation and your expert opinion, did you determine an opinion as to the highest and best use of the property in the after condition?

A. The only thing -- Yes, I have.

Q. What was it?

A. The only thing that I can conclude, the highest and best use of the property under the open space designation would be public ownership as open space with -- and, of course, this would produce no revenue to a landowner.

[273] Q. In your opinion, is the property marketable in the after condition?

A. No.

Q. Upon what do you base that opinion?

A. Primarily on the fact that an investor would be -- would be able to obtain, in my opinion, no clear-cut prediction -- he couldn't arrive at a clear-cut prediction nor could it be indicated by any of the sources that an informed purchaser would go to that -- would indicate that he could go ahead and produce it in any fashion that would produce income on his investment.

Q. Have you attempted to confirm this opinion?

A. Yes, I have, both in referring to the opinions of witnesses who have previously testified in this case, reading depositions of governmental officials that have been -- whose depositions were taken prior to the start of the trial, my own research into the subject, the examination and reading of the open space designation definitions -- those were some of the reasons.

Q. Have you also consulted with possibly purchasers?

A. Yes. Several of the developers of the industrial land within the area were interviewed about whether or not they would invest in the subject property subject to the open space designation, and again, the answer is that they wouldn't touch it, not knowing what they could do with it.

[274] Q. Again based on the opinion as to the highest and best use of the property, do you have an opinion as to its fair market value in the after condition?

A. I do.

Q. What was that?

A. I feel that in view of the limited potential uses that remain to the property, that it can't have more than nominal value. The nominal value that I assigned is somewhat arbitrary in -- $161,000, which is the equivalent of $1,000 per acre for the gross usable portion, and even this is based on the fact that within my appraisal experience I found lands out in remote areas of the desert that don't have any immediate or near term potential use, yet there are investors or purchasers in the marketplace who will still pay a nominal value for that type of land.

MR. GOEBEL: Okay. No further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. SUMPTION:

Q. Mr. Gallagher, you restified, [*sic*] I believe, that it was your opinion prior to June of 1973, the majority of the property had a best use for a modern industrial park; is that not correct?

A. Yes, sir.

Q. Would you indicate what portion you're referring to

general plan?

[276] A. I don't recall it at this moment.

Pardon me. Before -- I just want to see whether I do have that date with me.

The question was what, again, just --

Q. Whether you're aware of the date for implementation of the City of San Diego general plan?

A. I don't find it at the moment.

Q. Well, are you aware that there was a date of implementation sometime off in the future?

A. Yes, I'm sure that there was.

Q. Mr. Gallagher, you also indicated, I believe, in your testimony that you secured various City documents in order to assist you in determining what the property may be used for in its after condition, that is, after June of 1973. One of those documents you referred to was the open space booklet that's marked for identification as Plaintiff's Nos. 10 and 11; is that not correct?

A. That's correct.

Q. Are you aware of any legal interpretation as to the effect of designating property open space in a general plan that has been given by the City Attorney's office for the City of San Diego?

A. No, I'm not.

Q. Are you aware of any application for the use of this particular property, that is, application to the City?

[277] A. Well, I do in one fashion because it was known when the property was acquired from the -- a portion of the property was acquired from the City of San Diego that it was being acquired at that time as a potential site for a nuclear power plant.

Q. But are you aware of any actual application for use of this parcel of property, subject property?

A. Not of formal application, no.

Q. In fact, doesn't Plaintiff's Exhibit 11 have language in the test that would allow use for a nuclear power plant?

A. I don't recall that.

Q. Would that have any effect on your opinion of value in either the before or after condition if -- Well, strike that.

Would it have any effect on your opinion in the after condition if it were a fact that the open space plan provides for use as a nuclear power plant?

A. It could have if -- Well, it could have.

Q. Did you consider what effects it may have?

A. No.

Q. Mr. Gallagher, I believe you said you relied on opinions from attorneys including Mr. Goebel and Mr. Don Worley as far as their interpretation of the effect of designating property open space in a general plan; is that not correct:

[278] A. That's correct.

Q. Did you do any studies on your own insofar as the likelihood of the City allowing a use in accordance with the underlying zoning subsequent to its applying the open space designation on the subject property?

A. Yes.

Q. What were those studies?

A. Well, one example would be in discussing potential golf course usage with Mr. Vallis, he mentioned the fact that he was generally familiar with two instances where golf course usage was proposed within land that had an open space designation. One was in the -- as I recall, in the vicinity of Escondido, and the other was in San Diego County, and according to his information, neither one of them were successful in getting those uses through under the open space element.

Q. Theses were jurisdictions other than the City of San Diego.

A. Yes, uh-huh.

Q. I believe you indicated, also, Mr. Gallagher, that other documents you referred to were depositions of certain city employees in this case?

A. Correct.

Q. Did you read the deposition of James Goff?

A. I'm sure I did.

Q. Can you recall anything in that deposition that would lend support to your opinion that the City would not allow a use for the subject property in accordance with the underlying zoning?

[279] A. You better give me the first part of that question, if you will, please.

Q. In your review of Mr. Goff's desposition, do you recall whether there was anything in that deposition that would lend support to your apparent ultimate conclusion that the City would not allow any use for the subject property in accordance with its underlying zoning?

A. I don't recall at this moment whether there was or was not. It seems to me though that he did -- did talk -- or in response to some questions -- I just recall indistinctly at this time.

Q. Do you recall, in fact, that in Mr. Goff's deposition he indicated that an open space designation and industrial underlying zoning were not inconsistent?

A. I recall now that you've referred my memory that there was a statement of that nature.

Q. Do you recall his interpretation as to why he so concluded?

A. No, I don't.

Q. Do you recall him stating that the open space designation is not zoning, per se?

A. It seems to me that I do.

Q. Do you recall anything in any of the other depositions that you looked at that would lend support -- insofar as depositions of City employees that would lend support to your opinion or conclusion that the City of San Diego would not allow use of the property in accordance with its underlying zoning?

[280] A. I don't recall any specific ones at this moment. I would have to review them, but I recall that the impression I got that was supported by the balance of the research is that it's a pretty muddy area, and as I've testified, that no one investing in the property could, with any certainty, base a purchase price on what he was probably going to be permitted to do with the land under the open space designation.

Q. Now, the latter part of your statement is something that you formed a conclusion on; is that correct? That didn't come from testimony in depositions of City employees.

A. Well, the first part of my response certainly did. I had the impression from reading the multitude of depositions that it was certainly not a clear-out situation.

MR. SUMPTION: I have no further questions of this witness, your Honor.

THE COURT: Any redirect?

MR. GOEBEL: Yes.

BY MR. GOEBEL:

[284] Q. Mr. Gallagher, have you reviewed the open space plan, Plaintiff's 10 and 11 for any reference to possible use of this subject property for a nuclear power plant?

A. I have.

Q. And have you located a reference to that effect?

[285] A. I have.

Q. What does that reference state and where is it found?

A. It's found on -- It's the last paragraph on Page 24 of the publication, "A PLan for the Preservation of Natural Parks for San Diego," and it reads:

> "As in the Tia Juana River Valley subsystem, the San Diego Gas & Electric Company has a large 240-acre ownership which it intends to utilize as the location of a nuclear power plant sometime in the 1980's. Again, such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem; however, a number of approvals and clearances must be obtained prior to the plant's construction becoming a reality."

Q. Okay. I think counsel will stipulate that it's found in Plaintiff's 11 and not in Plaintiff's 10. We made a reference to Page 24, and --

THE COURT: Last paragraph of Page 24?

MR. SUMPTION: Yes. That's correct.

BY MR. GOEBEL:

Q. Now, Mr. Gallagher, does that reference that you've just read affect your opinion of the highest and best use and value of the property in the after condition?

A. No.

[286] Q. And why not?

A. Because it's my understanding that the -- that language resulted from meetings between the members of the San Diego Gas & Electric Company and City Planning, but at the time the language was created, only a portion of the property was designated as open space, approximately the northerly half. The southerly portion was not, and it was mutually understood at that time that -- and the language was based on the understanding that if a nuclear power plant would go in, it would go in on the land that was not designated as open space.

Since that time, the entire property has been desiganted as open space which is an entirely different situation, and based on what has happened, the problems of constructing and getting approvals for other power plants like San Onofre and other areas, and that, combined with the fact that the total property is designated open space as of the date of value in the after situation, and based on the qualifying phrases that even under the best circumstances a number of approvals and clearances would have to be obtained, I just don't think that it would be reasonably probable to assume that under these set of circumstances that a nuclear power plant could be constructed on the subject property, and as the appraiser is constantly dealing with reasonable probabilities, the facts and influences line up, in my judgment, hard on the negative side.

. . . .

EXAMINATION

BY THE COURT:

[290] Q. Mr. Gallagher, you testified in your opinion the highest and best use of the subject property in its after condition was public ownership; is that correct?

A. Yes, your Honor.

. . . .

Exerpts from testimony of **James Goff**
(called as witness by defendant)

. . . .

[333] THE COURT: The question, sir, is whether the open space designation is a zone.

THE WITNESS: It is not a zone as I would understand it under the Municipal Code as it applies to development regulations in the City of San Diego.

BY MR. SUMPTION:

Q. So that, in effect, if we have a situation where there is a piece of property such as the subject property designated as open space in the plan that I've referred to, and there is, in addition, a zone such as M-1-A or A-110 or whatever that has been applied on the property, would it be your interpretation that those two things are not inconsistent with one another?

A. That's correct, I would not judge them as being inconsistent.

Q. If the plaintiff were to apply for some sort of permission to build on the subject property in accordance with its underlying zoning, would your department recommend against such application on the sole basis that it's been designated for open space?

MR. GOEBEL: Objection. It calls for speculation on the part of the witness, and there's no proper foundation.

THE COURT: What is missing in the foundation, Mr. Goebel?

MR. GOEBEL: May we have the question back?

THE COURT: Read the question.

. . . .

[337] THE COURT: Yes, but all that Mr. Sumption is endeavoring to draw out is what recommendation would go to the City Council if and when he brings a witness in from the City Council or the Planning Commission to ask what they would do. That's something again. Right now, he's inquiring as to what -- that is, would there be a recommendation

against it solely on that ground. I believe the question is proper. Moreover, I have a further question that I will ask as soon as he answers this one.

You may answer the question if you remember it now.

THE WITNESS: My understanding of the question is, would we recommend against a development proposal in accordance with the underlying zoning solely because there was an open space designation on that particular property, and the answer is no.

THE COURT: That perhaps obviates my question, but the question that I would have asked otherwise is, would it have been proper for your department to have recommended against it solely on that basis whether you would have or not, as I understand your function as a Planning Department.

THE WITNESS: If I understand your question, I personally would not feel that it would be proper to come to that conclusion.

. . . .

[341] MR. SUMPTION: I guess it really only has bearing on application from the standpoint of what their potential action at some later time would be. I guess ultimately to come back to that same question.

THE COURT: Then, Mr. Goebel, my remarks a moment ago are applicable. Why would it not be relevant for that purpose?

MR. GOEBEL: To show what their actions were likely to be at some future time?

THE COURT: Yes. You have brought before the Court evidence that your client has not applied for relief or for permits because -- because of the advice given your client that it would be fruitless to do so. Now Mr. Sumption is offering advice given to the City Council as to the purpose for open space to rebut that. Why would that not be relevant?

MR. GOEBEL: Well, everybody indicates that the -- Nobody can predict the action of the City Council, whether the City Council is going to follow the advice of the attorney or not, so I'm saying it's speculative at the very least.

THE COURT: But is not the opinion -- are not the opinions heretofore introduced speculative based on the information available to them, namely, what they remembered in No. 11, the discussions they've had with various prospective developers and the like, and now on the other side of that is what the City Council was told the purpose

. . . .

[343] If you now recall in general or specific terms any advice given to the Council on that date by Mr. Conrad, you may relate it.

THE WITNESS: In general, I remember the Deputy City Attorney advising the Council as a result of questions from the Council as to whether the adoption of the open space -- the plan for the preservation of open space would, in fact, deep-freeze the property, and the gist of the response from the City -- Deputy City Attorney was, no, that was not the case, that reasonable efforts to acquire this property were under way in connection with a pending or anticipated successful bond issue, but that the underlying zoning would have to be judged should someone desire to develop their property, and the kind of development would be related to the requirements and restrictions on that underlying zoning.

BY MR. SUMPTION:

Q. All right. Mr. Goff, subsequent to the failure of the September of 1973 ballot proposition for the open space bond, did you become aware of any alterations in the Community Development Department's open space acquisition program?

A. No, I did not, sir.

Q. Were you aware at any time subsequent to the failure of that bond issue that the Community Development Department removed some properties that had been designated for open space in the open space plan?

. . . .

[361] . . . It's customary in industrial uses, particularly of the type that are taking place further to the southeast in Sorrento Valley, to divide the property into smaller parcels that what B-1 is showing there, isn't it?

A. Given that situation, we probably would require a subdivision map in connection with a development proposal, yes, sir.

Q. And for any division of the property for purposes of, say, leasing or financing would require a subdivision map?

A. I believe that the answer is yes. There may be some technicality that I'm unaware of, but I think the answer generally is yes.

Q. In your position as Planning Director requires you to be familiar with the various legal requirements of the Government Code with respect to open space and also the Subdivision Map Act, doesn't it?

A. Yes, I would like to be reasonably conversant. I'm sure that I'm not in all respects, but --

Q. In fact, the provisions of the Subdivision Map Act are also administered to your department, right?

A. Well, they are processed through our department. We're not the only department that has a direct role in making recommendations on subdivision maps.

Q. I understand. We have had here testimony about your department in the area of general planning and also talked about it in the area of rezoning. Your department is also generally responsible for the operational aspects of processing subdivision maps, right?

[362] A. Yes, that's what I was intending to imply.

Q. And through the Subdivision Review Board, of which the Planning Department has a member and makes a recommendation, do you process the subdivision maps at the beginning level?

A. Yes, sir.

Q. And in the event of appeal, they go to the Planning Commission of the City of San Diego?

A. Yes, sir.

Q. So the Planning Department would be required to generate a recommendation on any subdivision map, right?

A. Well, the Subdivision Review Board, of which we are one of three members, yes, sir.

Q. But as to the land use planning features of the subdivision map, the Planning Department would be responsible?

A. Yes, but I think what you're talking about is the zoning that we would be more concerned with in terms of land use. I'm not really sure that I'm speaking the kind of answers that you're asking.

Q. The other two members of the Subdivision Review Board relate to matters unrelated to ones we're talking about here in court. You have traffic, and who is the other member?

A. Well, you have two members from the manager's -- under the manager's jurisdiction, but they would be concerned with not only traffic, but sewers, utilities, a whole host of additional factors.

[363] Q. Okay. I show you a provision of the Government Code, Section 66473.5 and ask you to review that.

A. Just this section right here?

Q. Yes.

A. All right.

Q. Now, that section states, in substance, that no local agency shall approve a map unless the legislative body shall find that the proposed subdivision is consistent with the general plan, right?

A. Yes, sir.

Q. Now, the open space element which we have before us here as Plaintiff's 10 and 11, the green book, is an element of the general plan, isn't it?

A. Yes, sir.

Q. So when we talk about the general plan in these various legal provisions, you understand that the general plan means, in part, the open space element?

A. Yes, sir.

Q. And when we're referring here to the proposed subdivision, you intend that to mean a proposed subdivision map such as we've discussed would be customarily required for industrial development on the subject property?

A. Yes, sir.

Q. Then would you read the following section, 66474.

[364] A. Okay.

Q. And that states, in pertinent part here that a legislative body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings: That the proposed map is not consistent with applicable general and specific plans -- isn't that a fair statement of what it says on that subject?

A. In general, yes, sir.

Q. And that says, "Shall deny approval," correct?

A. Yes, sir.

Q. Is it your interpretation from that provision that that means that it is in the disjunctive, that is, that only one of those findings has to be made in order to require denial?

A. I believe that's the case. If it does not --

Q. Look at it again, if you need to.

A. Yes, it says, "If it makes any of the following."

Q. So then you would agree with -- Strike that.

You would generally interpret in the performance of your duties that the Government Code then not only permits but requires that a subdivision map be denied if the legislative body makes a finding that the subdivision is inconsistent with the general plan?

A. If they make a finding that it is inconsistent, yes, sir.

Q. And they're required to consider -- or, that is, they can just not refuse to address the subject. They're affirmatively required to address whether it's consistent?

[365] A. I believe the answer is yes. I'm not understanding the point you're making, but --

Q. Now, I ask you to refer to Section 66 -- excuse me, 65567. Would you review that to yourself, please.

A. I've read it.

Q. And that states that no building permit may be issued, no subdivision map approved, and no open space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open space plan; is that right?

A. Yes, sir.

Q. So again, you would view that -- from your interpretation, there would have to be an affirmative determination that the proposal was consistent with the -- not only the general plan, but the open space element of the general plan?

A. Yes, sir.

Q. Now, is your testimony then that an industrial development proposal which would contemplate a division of the property into more than four parcels, such as indicated on Exhibit 1-E, could, under any circumstances, be consistent with the open space designation?

A. I don't understand your question. You said if it's divided into four parcels as indicated, and I can't see -- there was something about a categorical conclusion.

[366] Q. Let me set the basis. I want you to be sure you understand the question.

You agreed with me previously, I think, that industrial development for a parcel this size would probably require a subdivision map?

A. Yes, sir.

Q. That's customarily required of four or more parcels?

A. Yes, sir.

Q. And from your experience, that would be the customary thing that would happen if a party wanted to develop this property for industrial purposes?

A. Yes, sir.

Q. So then my question was, assuming that that's the case, and assuming further that this property has been designated for open space as it was on June 19, 1973, are you then telling me that your department would not find any proposed industrial development consistent with the open space plan?

A. Well, the question suggests to me that it's a very conceivable possibility we would agree. That's my understanding of your question, and it would be hard for me to conclude that, but I would say in general I would imagine that an industrial development in that area would be consistent or could be very well consistent with the general plan and with the Torrey Pines Community Plan.

[367] Q. Well, could -- Can you define for me what you mean by consistent?

A. Something that we would find when we're reviewing the subdivision regulations that we were just looking at, that would put us in a position of recommending approval of a particular project that we would not conclude that the meaning construed from that ordinance language and applied to that particular project in that area would result in an inconsistency. I don't really know how to define it other than they're compatible. There must be other words that you can use, but they would be consistent.

Q. Well, isn't it a fact that most, if not all, industrial subdivisions that you received and reviewed in the Planning Department contemplate the building -- the building of buildings on each of the lots defined in the map?

A. I think generally so, but not without appropriate open space within the project itself which I would find would be one method of determining whether there was consistency.

Q. So if a large enough percentage of open space were reserved, you might find it to be consistent?

A. I don't know whether it might be a percentage. It might be in the nature of the design.

Q. To your knowledge, does the City have any single controlling definition on the subject of open space that's consistently applied?

[368] A. Well, I think there's a general definition of the meaning and intent of open space in the planning for the preservation of natural parks.

Q. Well, if I understood your testimony previously, you agreed with me that one of the things that was required of your department to

discharge its duties under the Government Code was to review any plan and determine if it was consistent with the open space plan?

A. That would be one of our charges, yes, sir.

Q. Now, when you conduct this process of review, do you have a single definition of open space that you consistently apply?

A. Well, we would be guided by the policy that's contained in that plan, the language that describes the intent and purpose of open space.

Q. Well, I understand that you would be guided by the policy and so forth, but is there any single definition of open space that you consistently apply?

A. I don't think that there is such a thing as a single definition. I think open space can be achieved in a number of different ways.

Q. Would you review --

A. Within the meaning particularly of that plan.

Q. Would you review the plan and see if you can locate the definition that you have reference to as being part of this plan?

[369] A. I believe the definition is indicated in here on Page 2, and it's underlined:

> "Any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

THE COURT: When you read, sir, would you mind reading a little slower?

THE WITNESS: I apologize. Should -- Should -- I guess I should read it again.

> "Any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

THE COURT: You've read from Exhibit 11, have you, sir? Or did you read from 10?

THE WITNESS: This is from the plan -- I don't know the number of it.

MR. GOEBEL: Plaintiff's 10.

THE COURT: Plaintiff's 10.

MR. GOEBEL: I'll highlight it in red.

THE WITNESS: This is the definition we've indicated for most purposes we would utilize. The report does have some other indications of open space that would also be considered, but this is perhaps the most simple definition of it that we've incorporated in the document.

BY MR. GOEBEL:

[370] Q. I've highlighted then in red the part that you've read into the record; is that right?

A. Yes, sir.

Q. Now, immediately above that, there's a definition that at least the plan represents as found in the City of San Diego Municipal Code; isn't that right?

A. Yes, sir.

Q. Do you subscribe to that one, also?

A. Yes, sir. I think the whole intent of the section in the report is to indicate that there are a number of different ways that I can define open space, and certainly that would be one that we would have to subscribe to.

Q. Well, in carrying out your charge to determine whether a particular subdivision map is consistent with the open space plan, do you apply the one that I've highlighted in red or the Code definition?

A. I would like to think that we would consider all of these.

Q. Well, would you read then the Code definition?

A. You're referring to this section right here?

Q. Yes.

A. "Open space land means any land or water area (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which, in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the progress guide and general plan for the City of San Diego as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

[371] Q. Let's highlight that in blue, if you would, just the part you read.

A. It's going to block it all out.

Q. You can read through that.

And you attempt to apply this definition in making your definitions, right?

A. Yes, sir.

Q. Now, do you consider that any industrial development on this portion of the subject property indicated in brown on Plaintiff's 1 across the way would leave the property primarily in its natural state?

A. I think there could be a design for industrial development on that property that would achieve essentially what's called for here, yes, sir. I haven't seen one, but I think that that's possible.

[372] Q. And do you think that that design would have the property with value for park and recreation purposes?

A. I think it could be either that or, as the definition indicates, complement the adjacent area for said purposes.

Q. In fact, the adoption of the open space element is not a static thing, is it?

A. I would assume over a period of time, that it would be periodically updated, yes, sir.

Q. Well, I guess I should be more precise in my question. In fact, once having adopted the open space element to the general plan, there falls upon the City a duty to bring its zoning into conformance with the open space element to the general plan; isn't that right?

A. We don't have any such thing as an open space zone that we could do what you're talking about.

Q. Again, I ask you to refer to the Government Code, and particularly Section 65860. Would you just review that to yourself?

A. Yes, sir.

Q. Okay, that provides, in substance, that County or City zoning ordinances shall be consistent with the general plan of the County or City by January 1, 1974, right?

A. Yes, sir.

Q. And the open space element is one aspect of the general plan, right?

[373] A. Yes, sir.

Q. And it further indicates that in the event a zoning ordinance becomes inconsistent with the general plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan?

A. Yes, sir.

Q. Therefore, if we were to assume for a moment that the M-1-A zoning is inconsistent with the open space designation, there would be an affirmative duty on the part of the City to amend the zoning ordinance to bring it into compliance, correct?

A. If you made that assumption that there was that inconsistency, yes, sir.

Q. And, in fact, since the adoption of the open space element in June, 1973, the Planning Department has conducted mass rezonings of various communities of the City to bring the zoning into compliance with the open space element; isn't that right?

A. No, sir.

Q. Well, didn't, in fact, the college area undergo a rezoning which was initiated, in part at least, by the open space element to the general plan?

A. No, sir, I don't believe that's a fair characterization of the action. The action was an intent to make the development regulations, that is, the zoning, conform to the development proposals in a community plan, and very often, you'll find instances where there will be a preference for open space preservation in areas, but with the recognition that they require or there would be required steps that might not be within the purview of the City to execute, that there should be some alternative use for the property, and what we were doing to the State College area, as I recall, was merely making the underlying zoning consistent with those development proposals which were alternatives to acquisition and preservation or no development whatsoever, and it's a very common situation that we face. It's a particular example in the area that we're talking about here where there are proposals for open space, there are also alternatives for the appropriate backup zoning, so to speak.

[374] Q. Well, you're saying that in the Torrey Pines Community Plan there exist properties which, while being designated as possible open space, contain an alternative land use expressly-indicate; is that right?

A. Yes, sir.

Q. The subject property is not one of those properties, is it?

A. A portion of the subject property is indicated in the Torrey Pines Community Plan for further valuation, yes, sir.

Q. But that language is not in the same form as the language that's used in the other parcels that you had reference to.

[375] A. I don't understand your question, sir.

Q. You have not designated any other parcels with that particular type of language, have you?

A. In the Torrey Pines plan, sir, I don't recall that we do, no, sir.

Q. In fact, in the Torrey Pines plan on those parcels that you have reference to, it says that if the property is not acquired for public purposes within 18 months, then the property owner may develop it to a certain specific residential density; isn't that right?

A. I recall that there is that stipulation added to that.

Q. But no stipulation or system limit is set with respect to the subject property?

A. The portion of the subject property is not even recommended for open space or industrial or whatever. It's indicated, as I stated, it's under -- it's an area for further study.

Q. And you're referring essentially to the designtion found at Page 94 of Defendant's Exhibit D?

A. In reference to the area for further study, yes, sir.

Q. The area shows in white, and it has the language "Future use under study"?

A. Yes, sir.

Q. What is your interpretation of the meaning of "Future use under study"?

[376] A. It means that the ultimate disposition of that in terms of recommendations as far as the City Council is concerned are awaiting various studies to give clues as to what would be appropriate uses in those areas. The property is in the industrial zone at the present time, but there is some consideration in the study for perhaps some alternative.

Q. Now, in fact, your department studied the subject property for approximately eight months prior to the actions of the City in June of 1973; isn't that right?

A. If you're referring to the recommendations on zoning which emanated from the City Council, I'm not sure how we scheduled it, but there was a study of that nature, yes, sir.

Q. And wasn't it the determination of the Operations Division of your department that the parcel shown as B on Plaintiff's Exhibit 1 should remain in the industrial zone?

A. Given the information that we had available at the time, yes, sir.

Q. And that action was ultimately taken by the Council on June 7 of 1973, right?

A. I believe so, sir.

Q. And then on June 19, 1973, another division of your department recommended that that very same property be designated for open space; isn't that right?

A. I believe that's correct, sir.

Q. And then in 1975, you're telling us that once again your department is recommending that there be more studies conducted on the parcel referred to as B on Plaintiff's 1?

[377] A. To undertake studies that were not undertaken in connection with the rezoning consideration, yes, sir.

Q. And are there any such studies in progress at this time?

A. It's my understanding that there are, but they're not within the purview of the City of San Diego.

Q. The City is not doing any studies at this time?

A. Not to my knowledge, sir.

Exerpts from testimony of **Kenneth Klein**:
(called as witness by defendant)

. . . .

[382] Q. What was the ultimate action by the City Council with respect to the rezoning?

A. They concurred with both the department and the Planning Commission with respect to the rezoning which I've just outlined.

Q. Were you present, Mr. Klein, at the April 11, 1973 Planning Commission Hearing?

A. I believe so, yes.

Q. Do you recall whether or not representatives of the San Diego Gas & Electric Company appeared at that hearing?

A. I believe they did, yes.

Q. Do you recall whether a Mr. Frank DeVore representing the Gas & Electric Company was present at that hearing?

A. I have reviewed those minutes, and yes, he was present.

Q. Do you recall, Mr. Klein, whether or not Mr. DeVore responded to questions asked him by members of the Planning Commission with respect to the rezoning of this property?

A. Yes, he did.

Q. Do you recall the nature of those questions and Mr. DeVore's response?

A. I can recall, and my memory was refreshed by reading in the minutes that someone just before the vote was taken on the matter asked Mr. DeVore if this rezoning would have any effect on the Gas & Electric Company's plans, and Mr. DeVore responded that he felt it would not have any effect on the long-range plans of the development of this land.

[383] Q. Do you recall whether Mr. DeVore or anyone else representing the Gas & Electric Company at that hearing voiced any concern for use of the property for industrial purposes?

A. I don't recall -- in terms of the area that was rezoned?

Q. Yes.

A. I don't recall that, no.

Q. Do you recall whether any reference -- any similar reference was made to any other portion of the subject property?

A. I believe they did discuss the possibility of a power plant facility being placed on the other portion of the property that remained in the M-1-A or nestled into the hill or something of that nature was discussed at the time.

Q. Mr. Klein, are you generally familiar with uses that may be permitted through the vehicle of a conditional use permit?

A. Yes.

Q. Does the City of San Diego have specific uses that may be made for property regardless of the underlying zoning through this vehicle?

A. Yes.

[384] Q. Could you describe -- Strike that.

Have you made an attempt to determine whether any uses allowed by the conditional use permit might be reasonably made for the northerly portion of the subject property, and when I refer to the northerly portion, I mean generally to the north of the line that bisects the property east, in an east and west direction?

A. Yes, I think there are uses that are permitted under a conditional use permit that could lend themselves to this property.

Q. Would you tell us what those uses are, please?

A. Let me refer to my planning zone regulations. I will just enumerate some of the uses that would be conceivable under a use permit. Basically, in any zone, first of all, electric distribution and gas stations serving the immediate area, parking facilities -- I think this might be a pretty significant one because if adjacent industrial zoned property were developed, parking could be provided within the area that is in the A-110 zone or was rezoned A-110 under a conditional use permit. These would be uses that the permit could be granted by the zoning administrator.

Moving on, other uses that would be possible in this zone -- boarding kennels for dogs and cats and any agricultural, industrial or commerical zone, in this case both the industrial or the agricultural would qualify -- building structures and uses operated by a public utility. Under the present ownership, of course, they could come in for any use under this provision if they did remain the owner of the property. Private recreational facilities, golf courses, driving ranges, pitch-and-putt golf courses, minature golf courses, research, development and testing laboratories and facilities which would encompass broad range of scientific facilities or industrial research and development -- in addition, camping parks together with incidental facilities in any commerical or industrial zone except the SR and any agricultural or floodway zone -- these uses would be permitted.

I think this generally, in reviewing the conditional use permit, would be uses that can be considered for development of that portion that was placed in the agricultural zone.

[385] Q. Mr. Klein, do you recall whether or not at the hearings on the rezoning before the Planning Commission or the City Council, whether any representative of the Gas & Electric Company presented any evidence with regard to the economic feasibility of making use of the property in light of the recommendation for rezoning?

A. I do not recall any such evidence being submitted.

THE COURT

SAN DIEGO, CALIFORNIA, WEDNESDAY, JANUARY 28, 1976, 10:00 A.M.

[411] THE COURT: Good morning, gentlemen. The Court has had an opportunity to go over the documents received in evidence and the cases that were cited during argument and also to review notes taken during the testimony.

The Court has concluded that the plaintiff has established by a preponderance of the evidence that there was a taking of the property pursuant to the authorities concerning inverse condemnation, and the Court therefore finds liability on the part of the defendant; accordingly, we are ready to proceed with the damage aspect of the case. I might comment that the case cited by the plaintiff with regard to the exhaustion of administrative remedies was somewhat less than persuasive in light of the fact that the Court took the liberty of going back and reading the case relied on, the *Ogo* (phonetic spelling) case. The *Ogo* case simply says that there is an exception to the exhaustion of administrative remedies doctrine when the aggrieved party can positively state what the administrative decision in his particular case would be. Now, if that's all we had, then we would logically determine in this case that by a preponderance of the evidence the opinions stated could lead the Court to the conclusion that those opinions are a statement by the plaintiff of what the administrative agency's decision would be; however, the case relied on was that of *Gastner vs. Mantern*

[412] *Company* (phonetic spelling), and when one reads that case, the language used therein was that by a long line of decisions, the Commission had made plain its views as to the law applicable to a situation similar to the one being litigated, and that therefore it would habe [*sic*] been an idle act to have asked for review by the Commission. The Court in the *Gastner* case held that the Court could not presume that the Commission, having adopted a particular rule or policy in like cases in the past, would necessarily have applied the same rule in the case at bar. Then they qualify it. The exhaustion of remedial procedure as laid down by the statute is required unless the petitioner can positively state that the Commission has declared what its ruling will be in the particular case, and in the *Gastner* case, the petitioner therein was unable to do that.

Typically, we find a situation where an Appellate Court in its decision has relied on an earlier decision which decision does not support the opinion of the Appellate Court. Nonetheless, looking at the other aspects of the *Ogo* case and the circumstances of this case, the Court still is of the opinion that that doctrine has been met.

MR. GOEBEL: I cited also the *Snead* case, and I think *Snead* raises the question of whether the doctrine is even applicable in this situation.

THE COURT: That's another aspect of the Court's reasoning for ruling as it has done, but I wanted to clarify your presentation of those cases in any event.

[413] MR. SUMPTION: Your Honor, I have two items that I would like to be heard on. One is perhaps some clarification of the extent of the Court's ruling, and the other is, I would like to be heard as far as proceeding immediately with the damage phase of the trial. I don't know if the Court prefers one before the other.

THE COURT: Whichever you prefer to present first, I'll hear you on.

MR. SUMPTION: Well, as far as the ruling is concerned, your Honor, by your statements, I take it that what you're saying is there has been established a taking as opposed to a damaging.

THE COURT: That's correct.

MR. SUMPTION: And also, you indicated the property -- and I assume from that you're referring to the property -- the subject property in its entirety rather than certain portions thereof --

THE COURT: That is also correct.

MR. SUMPTION: And also, I believe implicit in the Court's ruling would then be that the Court has rejected the defendant's contention that the appropriate remedy would be declaratory relief as opposed to money damages?

THE COURT: Yes, sir.

EXHIBITS

CITY of SAN DIEGO
MEMORANDUM

FILE NO.:

DATE: The Honorable Mayor and City Council

FROM: City Planning Commission

SUBJECT: Open Space Plan

The hearing at this time concerns a proposal to adopt an open space plan.

Section 65563 of the State Planning and Zoning Law declares that, "On or before June 30, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency, a local open-space plan for the comprehensive and long-range preservation of open-space plan for the comprehensive and long-range preservation of open-space land within its jurisdiction. . ." To meet this requirement, the department has prepared an open space plan described in the report, *A Plan for the Preservation of Natural Parks for San Diego*. This plan primarily emphasizes preservation of San Diego's stream canyons and valleys. Five major subsystems of City-wide significance are identified, along with nearly a score of community-related subsystems. In numerical terms, the total system projected encompasses approximately 51,000 acres, of which about 23,000 are already publicly owned. An additional 17,000 acres are designated for "limited development under zoning," while the remaining 11,000 acres are proposed for acquisition.

On May 16 and 23, 1973, the Planning Commission considered the proposed plan at a noticed public hearing. At the conclusion of the hearing, which is recorded on pages 320 through 324 of the Planning Commission minutes for 1973, the Commission voted 5-0 to approve and recommend adoption of the open space plan as represented by the report, *A Plan for the Preservation of Natural Parks for San Diego*, a report addendum, and Exhibit Maps "A" and "B". Opposition was essentially limited to a spokesman for the Penasquitos Corporation,

who objected to the estimated acquisition acreages applied to certain properties.

James L. Goff
Planning Director

A PLAN FOR THE PRESERVATION OF NATURAL PARKS FOR SAN DIEGO

An Open Space Plan for San Diego City required by State Government Code, as amended by Chapter 251, Statutes of 1972:

65563. On or before June 30, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiciton. . . . . .

65564. Every local open-space plan shall contain an action program consisting of specific programs which the legislative body intends to pursue in implementing its open-space plan.

65566. Any action by a county or city which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.

65567. No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.

CITY PLANNING DEPARTMENT
GENERAL PLANNING SECTION
CITY ADMINISTRATION BUILDING
COMMUNITY CONCOURSE
SAN DIEGO, CALIFORNIA 92101
APRIL, 1973

CHAPTER 1 - INTRODUCTION

By recent legislative enactment, the State of California has decreed that

> On or before June 30, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction.[1]

This Plan for the Preservation of Natural Parks in its entirety is intended to constitute a local open space plan for the City of San Diego. Following adoption by the Council, it will be submitted to the Secretary of the Resources Agency.

At the same time, this report is also intended to serve as one of a series of eight background reports on various of the elements that will collectively comprise the City's revised General Plan. The latter is scheduled to emerge from an extensive process of comprehensive review sometime in 1973.

OPEN SPACE - AN ATTEMPT AT DEFINITION

Although definitions of "open space" abound, clearly no one of them has yet attained universal acceptance. Nor is this surprising, for open space by its very nature resists explicit delineation. One of the more recognizable difficulties, surely, is that "open space means different things to different people for different reasons."[2]

As might be surmised, somewhat differing definitions of open space have been set forth in various legislative enactments. Under the Housing Act of 1961, open space land was defined as any undeveloped or predominantly undeveloped land in an urban area which has value

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[1]Portion of Section 65563 of the *Government Code* as amended by Chapter 251, Statutes of 1972.

[2]California Legislature, *Joint Committee on Open Land Final Report*, Feb. 1970, p. 51.

for (a) park and recreational purposes, (b) conservation of land and other resources, or (c) historic or scenic purposes.[3]

A 1959 California statute authorizing cities and counties to expend public funds for the acquisition of open space declared that:

> . . . an "open space" or "open area" is any place or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.[4]

More recently, state legislation defined "open-space land" as "any parcel or area of land or water which is essentially unimproved and devoted to an open space use . . . ."[5] The latter term, "open-space use", is defined as "the use of land for (1) public recreation, (2) enjoyment of scenic beauty, (3) conservation or use of natural resources, or (4) production of food or fiber."[6]

Within the City of San Diego Municipal Code, the following definition is found:

> "Open space land" means any land or water area:
>
> (1) which is primarily in its natural state and has value for park and recreation purposes, and
> (2) which, in the opinion of the City Council of the City,
> (a) conforms to the criteria established for open space land set forth in the "Progress Guide and General Plan for The City of San Diego" as amended, and

[3]U.S. Congress, *Housing Act of 1961*, Sec. 706, Public Law 87-70, 87th Cong., 1st Sess., 1961.
[4]California, *Government Code* (1972), Sec. 6954.
[5]California, *Government Code* (1972), Sec. 65560.
[6]*Ibid.*

> (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources.[7]

For most purposes of this plan report it is desirable that open space bear a definition that is both simplified and encompassing. Consequently, as generally used hereafter, open space should be understood to mean *any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes.*

THE USES AND IMPORTANCE OF OPEN SPACE

The past two decades have witnessed a phenomenal upwelling of public interest in open space and its preservation. Accompanying this surge and heavily contributing to it has been a mass of published materials covering virtually all aspects of open space. So many of these materials have dealt so extensively with the uses and importance of open space that little needs be added here. Consequently, the discussion

. . . .

Recent changes in the State Subdivision Map Act should considerably strengthen the utility of the subdivision regulation process as a means of preserving open space. Most notably, Assembly Bill 1301, enacted in the 1971 legislative session and effective in March 1972, provides in part that

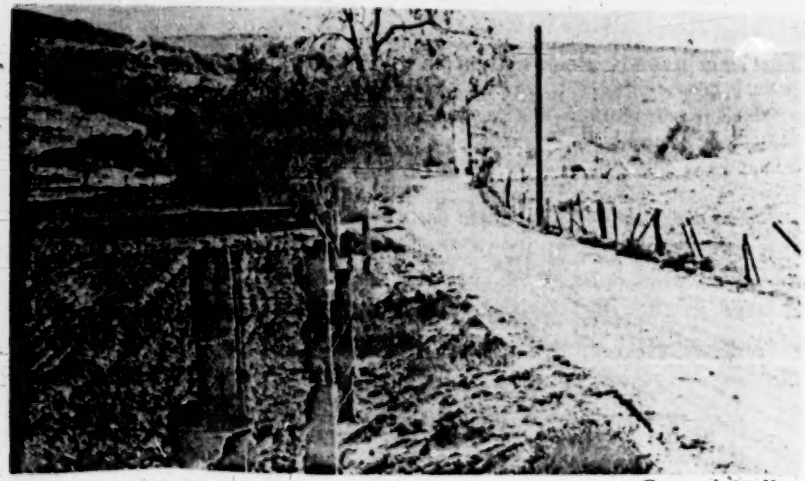
> A governing body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings:
>
> (a) That the proposed map is not consistent with applicable general and specific plans.[9] . . . . . .

[7]San Diego Municipal Code, Sec. 61.0601.
[9]California, *Business and Professions Code* (1972), Sec. 11549.5.

As might be expected, the views from Black Mountain are outstanding and the views of it from surrounding lower areas add much to the place-identity of North City. Although the City has a 200 acre park site near the summit and owns an additional 90 acres nearby, it does not now own the summit itself. The City is proposing to acquire some 240 acres which include the higher areas and surrounding steep slopes.

LOS PENASQUITOS LAGOON-CARMEL VALLEY-McGONIGLE CANYON

Los Penasquitos Lagoon, although separated from Carmel Valley and McGonigle Canyon by the San Diego Freeway, is an extremely important part of this subsystem. Its value as a wildlife habitat for many marine and terrestrial animals and plants should not be underemphasized. Because the entire subsystem is being encroached upon by urban development, efforts to assure its preservation should be undertaken as soon as practicable.



Carmel Valley

As in the Tia Juana River Valley Subsystem, the San Diego Gas & Electric Company has a large (240 acre) ownership which it intends to utilize as the location of a nuclear power plant sometime in the 1980's. Again, such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem; however, a number of approvals and clearances must be obtained prior to the plant's construction becoming a reality.

Plaintiff's
EXHIBIT "11"

CITY of SAN DIEGO
MEMORANDUM

June 27, 1972

File

MDS

Transcript of Council Conference on Open Space, March 16, 1972

Moore - regional systems involve other governmental agencies, and therefore more complex participation issues are involved.

Sub-regional systems are more immediate, clearly requiring City initiative.

Goff - There are interchangeable aspects between regional and sub-regional systems;
they can interchange.

Moore - Our financing capability is better related to the sub-regional system. Other agencies will be involved in acquiring the regional system.

Morrow opposed to use of term, "acquisition," would prefer to exhaust possibilities offered by agricultural and floodplain zoning. Also opposed to priority list of open spaces, since such a list could cause the owners of the parcels concerned to raise their asking prices.

Planning and City Attorney are directed to prepare a schedule of those open space areas on which City could proceed to initiate agricultural, floodplain, and/or LC rezoning.

Plaintiff's
EXHIBIT "22"

COUNCIL CONFERENCE
3:15 p.m.
Thursday, March 16, 1972
Conference Room

ATTENDANCE Present: Councilmen Johnson, O'Connor, Landt, Morrow, Martinet, Bates, and Mayor Wilson.
Absent: Councilmen Williams and Hitch.
Also Present: City Manager Moore, Assistant to the City Manager Lockwood, Deputy City Attorney Valderhaug, and Recreation Director, Pauline des Granges.

. . . .

OPEN SPACE BOND ISSUE Mr. Moore announced that the purpose of the Conference was to get down to cases and recognize city-wide open spaces. He gave a brief resume of his report on the needs and financing of the Open Space System; recommending that not more than 2/3's of the Environmental Fund be ear-marked for open space acquisition, and further recommended the Auditor's six-year scheduling of bond sales.

Mr. Goff gave a presentation of inventory of areas designated as desirable for acquisition as open space.

Mr. MacFarlane presented an evaluation of lands listed in the inventory.

Mr. Sage spoke on available methods of financing with suggested alternates:

1. Special Environmental Growth Fund and General Obligation Bonds.

this method would provide a substantial portion of the funding requirements for the program at a

Plaintiff's
EXHIBIT "22A"

reasonable borrowing cost. It would have no effect on the property tax rate provided the Council did not eliminate the Special Environmental Growth Fund. A two-thirds affirmative vote of the electorate would be required to issue general obligation bonds.

2. Charter Change. A Charter change could be placed on the ballot whereby the Special Environmental Growth Fund would be established by Charter, calling for a fixed percentage of the San Diego Gas & Electric Company annual franchise fees to be placed in the fund for open space and authorizing the City Council to incur debt for open space purposes using the monies available in the established fund.

Only a majority vote of the electorate would be necessary to pass the Charter change. It would establish and restrict certain funds for a definite environmental program and would provide the Council with flexibility in amending the program.

Mr. Moore stated that the primary thing the Council should resolve at this Conference is the tentative approval of the tentative system; resolve which election it is going to go on, and what portion of the Environmental Fund they wish to pledge for this particular purpose; recommending they consider 2/3's of that fund for this purpose.

Mayor Wilson stated it was his opinion that the General Obligation Bond would give the City the best rate, and what the people needed, in order to pass it, was the assurance that it would not cost them anything; which is what the City can give them by the action of the Council.

Plaintiff's
EXHIBIT "22A"

Councilman Martinet moved that an Ordinance be placed on the docket adding a proposition to the Special Municipal Election Ordinance providing a Charter Amendment pledging 2/3's of the franchise fee for the purpose of debt service and retirement of the principal for bonds for the purpose of acquisition of open space for parks. This was seconded by Councilman Morrow and carried unanimously.

On motion of Councilman Martinet, seconded by Councilman Morrow, the Planning Director and the City Attorney were directed to proceed to determine a schedule of those open space areas which they felt they could proceed to rezone.

Deputy City Attorney Bulens stated he thought there should be a Resolution passed by the Council authorizing the Attorney's Office to work with the Bond Counsel.

Councilman Bates moved that the Planning Department be directed to report back after studying as to the propriety of the proceedings with further flood plain zoning on flood plains located within the City. Councilman Landt seconded this motion which carried unanimously.

ADJOURNMENT The meeting was adjourned at 5:34 p.m.

Ann Jollett
Recording Secretary

Plaintiff's
EXHIBIT "22A"

APPENDIX "A"

INVALIDATION – A REMEDY?

In 1969, Richard Roe acquired Blackacre, a 20-acre parcel of unimproved land in the coastal area of a Southern California county. Investigation prior to purchase revealed that the land was located in the county, immediately adjacent to the growing city of Valverde. The land had no apparent limiting physical characteristics, and the county had been approving development for residential purposes on similarly situated land in the vicinity. Though located on the fringe of a drainage basin, the land was gently sloping and did not appear to be in any kind of flood plain proper.

Richard, a ranger with the State Department of Parks and Recreation, was married with two young children. The downpayment for the property was made from savings accumulated during the period of years that both he and his wife were employed early in their marriage.

Development for residential purposes within the county was available and processing of a planned subdivision in simple grid fashion was commenced. The property owner was approached by the City of Valverde with respect to annexation. The city indicated that it would bring sewer and water service and other municipal services to the property and that a well planned residential development of reasonable density would be favorably considered.

The property owner was persuaded by the city's proposal, since municipal services were not as readily available in the county's jurisdiction. A plan was developed for preplanning the property prior to annexation and the property was placed in a sewer assessment district with a proportionate cost of a major trunk sewer line assessed against the property.

1971 Processing of a planned residential development for the property commenced with the city.

1972 Processing delayed while the city implemented environmental impact report requirements pursuant to the *Friends of Mammoth* decision.

1973 Coastal Initiative went into effect.

1974 Planned residential development (hereinafter "PRD") delayed because of environmental impact report delay.

1975 PRD approved in concept.

Coastal permit applied for, but denied because of alleged discrepancy in the mapping of the flood plain designation by the county.

1977 New Coastal Act went into effect.

1978 Coastal permit denial invalidated, remand to Coastal Commission.

1979 Coastal permit again denied, this time because of potential prejudice of approval of the project to the preparation of the local coastal program.

1981 Denial of coastal permit invalidated and matter remanded to Coastal Commission.

PRD approval at the city expired. New application required, complying with all new rules and regulations.

1982 Updated assessment of environmental impact disclosed several fragments of Indian arrowheads on the property. The city required as a condition of approval of the PRD that a detailed archaeological survey of the property be made at an expense of approximately $50,000.

1985 City's condition on approval invalidated as patently unreasonable, matter remanded to city.

County and State Coastal Commission advocated the acquisition of the property by the public for "buffer reserve" in the drainage basin.

1986 Bond election held to raise funds to acquire the property for public use.

Bond election failed. Public interest in the property "expressly withdrawn".

1987 Approval of PRD denied because proposed use "inappropriate".

1990 Denial of PRD invalidated, matter remanded to city.

1991 Approval of PRD denied because residential density sought "too high for the area".

1993 Denial of PRD invalidated, matter remanded to city.

1994 Proposed project modified to reduce density by 20%.

Project approved, but subject to the condition that the property owner dedicate four acres of the property to the city for right of way and substation purposes for a proposed mass transit line which was included in the city's general plan.

1996 Condition requiring dedication invalidated as unreasonable, and the matter was remanded to the city.

Rezoning of property to one residence per 20 acres completed.

1999 Rezoning invalidated as unreasonable.

In the year 2000, his children, the assurance of whose education was one of the objectives of the original investment, had long since graduated from college with the benefit of government loans. Richard was thoroughly frustrated with the land use planning process in California. Despite the fact that he had paid real property taxes, sewer district assessments, insurance premiums for liability insurance, and enormous amounts for legal fees over the past 30 years, he decided to abandon any efforts to develop the property.

He offered to dedicate the property to the City of Valverde for no consideration. The city declined to accept the offer of dedication on the basis that to do so would take private property off the tax rolls, create a problem for the sewer assessment district, and create further liability exposure for the city.

After some effort, Richard located a non-profit conservancy entity which was willing to accept a gift of the property and deeded the property over to it. He took an income tax deduction for a charitable contribution in the amount of his initial investment. The Internal Revenue Service denied the deduction on the theory that based upon the planning history of the property for more than 20 years, the property apparently had no beneficial highest and best use and could have no more than a nominal fair market value.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

San Diego Gas & Electric Company, Appellant, (hereinafter sometimes "the property owner") appeals from the final judgment of the California Supreme Court entered August 22, 1979, denying Appellant a hearing to review the opinion of the California Court of Appeal, Fourth Appellate District, Division One, which held that a property owner may never bring an action in inverse condemnation seeking compensation in money damages for an unlawful exercise of the police power by a governmental entity, even though that action is excessive, arbitrary, unconstitutional, and denies the property owner all

use of its land. Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

On October 8, 1976 a judgment was entered in San Diego County Superior Court awarding money damages to the property owner. (Appendix A) The Findings of Fact and Conclusions of Law entered by the Court established as a matter of fact after full trial of the issues that the actions of the City of San Diego against the subject property constituted a taking without due process of law and just compensation within the meaning of the California and United States Constitutions. (Appendix A) An appeal was taken by the City of San Diego to the California Court of Appeal, Fourth Appellate District, Division One.

On June 13, 1978 the California Court of Appeal filed its opinion, modified on denial of rehearing (Appendix C), affirming the judgment in all respects. The opinion was certified for publication by the Court and was reported at 81 Cal.App.3d 844, 146 Cal.Rptr. 103. (Appendix B) When the California Supreme Court granted a hearing on July 13, 1978 (Appendix D), the opinion of the Court of Appeal was "superseded" pursuant to California Rule of Court 976 and is no longer deemed to be published.

The case was never heard by the California Supreme Court. After maintaining the matter on its docket without scheduling oral argument, on June 14, 1979 the California Supreme Court

entered an order (Appendix E) retransferring the case to the Court of Appeal, Fourth Appellate District, Division One, for reconsideration in light of its recent decision in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979). (Appendix F)

The California Court of Appeal, without additional briefing or oral argument, in an unpublished opinion dated June 26, 1979, directly and completely in contradiction to its previous opinion on the identical record, reversed the judgment of the trial court, finding that purported exercises of the police power, although arbitrary, unconstitutional, and denying the property owner all use of its land, do not require compensation. (Appendix G)

Appellant property owner's timely petition for rehearing to the Court of Appeal was denied by order filed July 9, 1979. (Appendix H) Appellant property owner's timely petition for hearing to the California Supreme Court was denied on August 22, 1979. (Appendix I)

JURISDICTION

A notice of appeal to this Court was duly filed in the California Court of Appeal, Fourth Appellate District, Division One (the Court having possession of the record of this case), on October 3, 1979 (Appendix J), appealing from the final judgment of the California Supreme Court. This appeal is being timely docketed in this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Appellant charges that the City of San Diego by its purported regulatory actions, in designating property owner's land as open space under its General Plan, in combination with

its zoning actions, its acquisition efforts, and its entire course of conduct, has destroyed the value of the land, prevented all use, and has thereby taken Appellant's property without due process of law and without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The judgment of the state court sustained the validity of these actions under the laws, ordinances, resolutions, and regulations of the City of San Diego and the State of California against the contention that they are repugnant to the Constitution of the United States.

Cases sustaining jurisdiction of an appeal to this Court from a judgment of a state court involving issues of whether a taking of private property has occurred and whether a property owner is entitled to compensation for the regulatory activities of a state or local government are the following: *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

QUESTIONS PRESENTED

1. Can a state court with impunity deny an aggrieved property owner its constitutionally mandated remedy of just compensation when a local government entity has

   (a) imposed arbitrary, excessive, and unconstitutional land use regulations;

   (b) commenced, but later abandoned direct acquisitive efforts under its power of eminent domain when its public purpose was satisfied by the restraints of the purported regulations; and

   (c) through a continuing course of conduct acted so as to deprive the property owner of all practical, beneficial or economic use of its property;

and the property owner has so established as a matter of fact after full trial of the issues?

2. Is not a remedy in money damages for inverse condemnation for a property owner aggrieved by oppressive regulatory activity under the guise of the police power mandated by

   (a) sound public policy, as an indispensable check against the arbitrary and capricious excesses of local government land use regulation masquerading under the banner of the police power;

   (b) an unbroken line of federal decisions, interpreting and applying the United States Constitution; and

   (c) the express guarantees of the Fifth and Fourteenth Amendments to the United States Constitution?

3. Is the purported invalidation remedy proffered by the California state courts a constitutionally adequate substitute for just compensation where the conduct complained of by the property owner is not a single regulation, but a continuing course of conduct, including arbitrary and capricious planning and zoning activities, intertwined with acquisitive intent, and punctuated by abortive direct condemnation efforts?

4. Does either the purported social desirability of unfettered planning discretion or the potential inhibiting financial force of inverse condemnation damages warrant or permit the

California courts to deny a property owner just compensation for the taking of private property for public use as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, as well as applicable portions of the California statutes and San Diego ordinances and resolutions are set forth in Appendix K.

STATEMENT OF THE CASE

Appellant in 1966 assembled a 412 acre parcel of land for possible future construction of a power plant. The property was zoned at the time of acquisition as M-1-A (industrial) and A-1-1 (agricultural holding), and the General Plan of the City of San Diego adopted in 1967 and reaffirmed through 1972, designated the property as industrial. The property that is the subject of this suit is approximately 206 acres of this parcel, 25 actually acquired from the City of San Diego in 1966. The land is located in the Sorrento Valley area of San Diego, in a relatively flat area at low elevation. A portion of it is subject to tidal action from the Pacific Ocean and other portions subject to "ponding" or standing water, due to poor drainage. The entire parcel has only sparse vegetation due to the soil's high salt content. The land is unoccupied except for utility lines.

Considerable industrial development took place in the Sorrento Valley area from 1966 through 1972. A January 1972

report, "San Diego Industry 1969-1990, A Planning Analysis," identified the Sorrento Valley area was one of the most desirable areas in the city for industrial expansion.

Commencing in early 1972, the City of San Diego began to formulate a plan to preserve and maintain open space in order to meet state statutory requirements.[1]

In March of 1972 the San Diego City Council met and asked the City Planning Director and the City Attorney to determine a schedule of areas that the City could preserve as open space by rezoning. Throughout 1972 the City's plans for acquisition of open space land continued, including discussions of an open space bond issue for the November election. The City Council in August of 1972 initiated a rezoning of the subject property in Sorrento Valley from M-1-A (industrial) to A-1-10 (agricultural holding) or other appropriate zone. The open space bond issue on the November 1972 ballot failed.

The General Plan of the City of San Diego was also being revised to provide for an open space element which State law required to be adopted by June 30, 1973. A portion of the subject property was designated as open space for public acquisition.

[1] The California Legislature in the late 1960's and early 1970's adopted a panoply of legislation pertaining to acquisition of "open space" land by local governments, which it declared to be a "public use" for which use of the power of eminent domain was authorized. (Government Code Sections 6950 *et seq.*) In 1972, legislation was enacted which required cities to adopt a General Plan with open space elements (Government Code Section 65302.2) and to adopt an open space zoning ordinance (Government Code Sections 65910-12). See Appendix K.

Concurrent with these changes in the General Plan, efforts were being made in the City's Community Development Department for the funding of open space acquisitions in preparation for a September, 1973 election. The acquisition cost of 120 acres of the subject land was estimated to be $900,000.

On April 17, 1973 the City Council adopted a resolution of public convenience and necessity, (Resolution No. 207761, Appendix K-8) and proposed a $22.5 million bond issue for acquisition of park reserve areas to be approved at the September, 1973 municipal election. No properties were specifically described, but the subject property was subsequently shown on maps publicizing the election as one of the properties to be acquired, as the trial court found and the California Court of Appeal affirmed. (Finding of Fact No. 24, Appendix A-7; original Court of Appeal Opinion, Appendix B-12).

In April, 1973 the Planning Commission held public hearings regarding the rezoning of property for "open space." The Commission recommended a downzoning of a portion of the subject property (approximately 39 acres) from industrial to agricultural, but recommended that a substantial portion (approximately 77 acres) remain designated as industrial and that a further segment (approximately 50 acres) be considered for future industrial use on the submission of a specific plan for development.

The Planning Commission scheduled its first public hearing on the new open space element to the City's General Plan for May 16, 1973. The plan as submitted proposed to designate only a portion of the subject property as open space, roughly the same portion as previously downzoned by the Planning Commission (approximately 39 acres). Because the proposed

plan was only made available to the public 24 hours before the hearing, a continuance was granted.

Representatives of the Planning Department and the Community Development Department realized at the time of the May 16 hearing that the plan did not conform to the plan being developed for the proposed bond issue. Revisions were made in an effort to coordinate the plans. The effect of the revision was to include the entirety of the subject property under the "open space" designation. When the continued hearing was held on May 23, 1973, the maps contained in the report, which was submitted to the Planning Commission and to the public, still erroneously reflected the earlier indication that only approximately 39 acres were to be designated as open space. No mention was made that the exhibits had been altered and, in fact, the property owner was unaware that a change had been made, and of the impact of that change on its property. The revised open space plan was adopted by the Planning Commission.

The City Council on May 30, 1973 received the report from the Community Development Department pertaining to the bond issue, entitled "Staff Report, Park Reserve Systems, April 29, 1973." The report designated substantially all of the subject property for acquisition as open space.

On June 7, 1973, the City Council accepted the recommendation of the Planning Commission and downzoned a portion (approximately 39 acres) of the subject property, but retained a substantial portion of the property in the industrial zone and retained a further portion as recommended for consideration as future industrial.

The new open space element of the City of San Diego's General Plan was presented to the City Council on June 19, 1973. The maps that were distributed to each member of the Council and the members of the public similarly contained the erroneous designation of the area to be included in the open space area, although the large scale wall maps had been corrected. No mention of the discrepancy was made on the public record. The open space plan was adopted as presented. The resultant effect was that the City Council designated as open space on June 19, 1973, property which it had only twelve days earlier specifically reviewed and recommended for retention in industrial zoning.

Testimony received from expert witnesses at the trial established that after the open space element was adopted, the land had no practical, beneficial or economic use, since no use which was consistent with the open space designation was economically or practically feasible.[2] The property at the time

[2] The definition of "open space" in the City's General Plan is: "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

San Diego Municipal Code section 61.0601 defines open space as: "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the 'Progress Guide and General Plan for the City of San Diego' as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

There was testimony from expert witnesses that the City required zoning to be consistent with the General Plan.

of trial, and today, is devoted solely to public use as open space, the use for which acquisition was sought by the City. Since the imposition of the open space designation, no further efforts have been made by the City to acquire the property through direct exercise of its power of eminent domain.

The trial court found and the Court of Appeal affirmed that, as a matter of fact, it would have been totally impractical and futile for the property owner to have applied for approval of any development on the portion of the property designated as "open space." (Finding of Fact No. 32, Appendix A-8; original Court of Appeal opinion, Appendix B-12).

The trial court found that the actions of the City of San Diego were:

> "motivated to achieve a public purpose . . . were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial, or economic use of the property . . . and, therefore . . . constitute a taking without due process of law and just compensation within the meaning of the California and United States constitutions. . . ." Conclusion of Law No. 1, Appendix A-8.

The judgment of the trial court was appealed by the City, and originally affirmed by the California Court of Appeal, Fourth Appellate District, Division One. See Appendix B.

The California Supreme Court granted hearing but later retransferred the case back to the Court of Appeal to be

reconsidered in light of its recent decision in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979).[3]

The Court of Appeal on reconsideration reversed the judgment, holding that a property owner may never sue in inverse condemnation and seek compensation for the exercise of the police power by a government entity, even though the challenged regulations and actions are excessive, arbitrary, unconstitutional and deny the property owner all use of its land.

HOW THE FEDERAL QUESTION IS PRESENTED

Appellant in its complaint alleged that the actions of the City of San Diego leading up to and including the zoning of its property for agricultural and manufacturing, but including it within the open space designation of the General Plan of the City of San Diego, was a "tak[ing] of plaintiff's property for public use without compensation."

The San Diego County Superior Court found that the actions of the City "taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and the United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property." Appendix A.

[3] Appeal of the *Agins* case to this Court has been docketed as 79-602. This case was a companion case with the *Agins* case at the California Supreme Court. When probable jurisdiction is noted in *Agins*, it may be desirable to consider the similarity of issues presented by these two cases. It is noted that while *Agins* is a pleading case, this case presents a full factual record after trial.

The Court of Appeal in its original review of the judgment found that the combination of the zoning of the property, its inclusion in the open space element, the City's policy of requiring consistency between zoning and the general plan, plus the City's efforts to acquire the land for open space had deprived the owner of the beneficial use of the land, concluding, "this is an example of inverse condemnation and the landowner should, under the Constitution, be compensated." Appendix B.

The California Supreme Court, after having granted a hearing in this case, rendered its decision in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979) in which it held:

> "A local entity's exercise of its police power which, . . . may exceed constitutional limits [does not] necessitat[e] the payment of compensation." 24 Cal.3d at 272.

Giving lip service to the fact that the Fifth Amendment of the United States Constitution prohibited the taking of private property for public use without just compensation, the Court nonetheless concluded, "the need for preserving a degree of freedom in the land use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuades us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief. . .", describing compensation as an "undesirable remedy." 24 Cal.3d at 274, 276-77.

When the Court of Appeal reconsidered the instant case, upon retransfer from the California Supreme Court, it reversed the judgment of the trial court (as well as "reversing" its own earlier opinion), finding,